SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 817

P. J. CARLIN CONSTRUCTION CO. AND THE TRAVELERS INSURANCE COMPANY, PETITIONERS,

vs.

EDWARD HEANEY AND STATE INDUSTRIAL BOARD OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

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[fol. 1]

IN COURT OF APPEALS OF NEW YORK

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 19th day of November in the year of our Lord one thousand nine hundred and thirty-five, before the Judges of said Court.

Witness—The Hon. Frederick E. Crane, Chief Judge Presiding. Wm. J. Armstrong, Clerk.

In the Matter of

The Claim for Compensation, &c., made by EDWARD HRANEY

vs.

P. J. CARLIN CONSTRUCTION Co., Employer, & ano., &c.

REMITTITUR—November 20, 1935

Be it remembered, That on the 17th day of May, in the year of our Lord one thousand nine hundred and thirty-[fol. 2] five, P. J. Carlin Construction Co., employer, and another, &c., the appellants in this cause, came here unto the Court of Appeals, by E. C. Sherwood, their attorney, and filed in the said Court a notice of appeal and return thereto from the order of the Appellate Division of the Supreme Court, in and for the Third Judicial Department. And State Industrial Board the respondent in said cause, afterwards appeared in said Court of Appeals by John J. Bennett, Jr., Attorney-General.

Which said notice of appeal and the return thereto, filed as aforesaid are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. William B. Davis, of counsel for the appellants, and by Mr. Roy Wiedersum of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs. A question under the Federal Constitution was presented and necessarily passed

upon by this Court. It relates to the exclusive jurisdiction of the Federal Courts over Admiralty cases. The claimant was injured by the explosion of a passenger steamer on the East River, New York. This court held that the Workmen's Compensation Law of the State applied, and that the Federal Courts had not exclusive jurisdiction to afford relief.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court there to be proceeded upon according to law.

[fol. 3] Wherefore, it is considered that the said order be affirmed with costs, &c., &c., as aforesaid.

And hereupon, as well the notice of appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Third Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

John Ludden, Deputy Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office

Albany, November 20, 1935.

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Deputy Clerk. (Seal.)

[fol. 4] IN COURT OF APPEALS OF NEW YORK

In the Matter of

The claim of EDWARD HEANEY for Compensation under the Workmen's Compensation Law; STATE INDUSTRIAL BOARD, Respondents,

against

P. J. CARLIN CONSTRUCTION CO., Employer; THE TRAVELERS INSURANCE COMPANY, Insurance carrier, Appellants

STATEMENT UNDER RULE 234

The injury to the employee occurred on September 9, 1932.

At a session of the State Industrial Board held on December 8, 1933, the award from which this appeal is taken was made, granting compensation to Edward Heaney.

The employer and the insurance carrier appear herein by E. C. Sherwood and the State Industrial Board by the Hon. John J. Bennett, Jr., the claimant by Slavin & Lichtman.

There has been no change of parties nor attorneys since the commencement of the proceeding, except that the employer and insurance carrier appeared in person or by attorneys other than E. C. Sherwood prior to the service of the notice of appeal.

[fol. 5] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

No. 3,241,796

[Title omitted]

NOTICE OF APPEAL TO APPELLATE DIVISION

SIRS:

Please take notice that P. J. Carlin Construction Company and The Travelers Insurance Company hereby appeal to the Appellate Division of the Supreme Court, Third Department, from the award of the State Industrial Board

[fol. 6] herein, made and entered in the office of said Board on the 8th day of December, 1933, notice of which award was sent to the parties by mail on the 18th day of December, 1933.

Dated, New York, N. Y., December 26, 1933.

Yours, etc., E. C. Sherwood, Attorney for Appellants, Office & P. O. Address, 100 East 42nd Street, Borough of Manhattan, New York City.

To State Industrial Board, 150 Leonard Street, New York, N. Y. Slavin & Leichtman, Esqs., Attorneys for Claimant, 11 West 42nd Street, New York, N. Y.

[fol. 7] BEFORE STATE INDUSTRIAL BOARD

Case No. 3,241,796

In the Matter of

The claim for compensation under the Workmen's Compensation Law, made by EDWARD HEANEY, Claimant-Respondent,

against

P. J. CARLIN CONSTRUCTION Co., Employer, and THE TRAVELERS INSURANCE COMPANY, Insurance carrier, Appellants

Conclusions of Fact, Ruling of Law, Award and Decision

This claim came on for hearing before the State Industrial Board in the State of New York on December 16, 1932, January 27, 1933, April 27, 1933, May 5, 1933 and November 8, 1933.

Appearances:

E. C. Sherwood, Esq., 100 East 42nd Street, New York, N. Y., attorney for appellants.

Slavin & Leichtman, Esqs., 11 West 42nd Street, New York, N. Y., attorney for claimant.

Claimant in person, 3018 Kingsbridge Avenue, New York City.

[fol. 8] All the evidence having been heard and duly considered, the State Industrial Board makes its Conclusions of Fact, Ruling of Law, Award and Decision, as follows:

Conclusions of Fact

1. On September 9, 1932, the day on which Edward Heaney sustained the accidental injuries herein referred to, he resided at 3018 Kingsbridge Avenue, Borough of Manhattan, City and State of New York, and was employed as a bricklayer by the P. J. Carlin Construction Co., with office and principal place of business located at 405 Madison Avenue, Borough of Manhattan, City and State of New York; said employer being engaged as general contractors performing construction work on Rikers Island, State of New York.

2. On September 9, 1932, while the said Edward Heaney was engaged in the regular course of his employment and while working for his employer, and after stepping aboard the steamboat "Observation" on 136th Street, in the Borough of Manhattan, City and State of New York, and standing on the lower deck of the said boat and while the said steamboat was in operation and en route to Rikers Island, the said boat exploded and as a result, the said Edward Heaney was thrown into the river and was caused to sustain accidental injuries in the nature of a fracture of the right lower ribs; laceration of the lung, with resultant pneumothorax, possible internal injuries and moderate shock, which injuries together with the results naturally and unavoidably following therefrom caused Edward Heaney to [fol. 9] be totally disabled from September 9, 1932 to October 14, 1932, on which latter date he was still disabled.

3. The injuries sustained by the said Edward Heaney were accidental injuries and the said Edward Heaney stepped into his employment the moment he stepped aboard the said steamboat "Observation." Therefore, the injuries which he sustained as aforesaid arose out of and in the course of his employment.

4. The average weekly wage of Edward Heaney was the sum of $66.00.

5. Prior to the time the said Edward Heaney sustained the accidental injuries herein above referred to, the City of New York was the owner of Rikers Island and had entered into a contract with the above named employer, P. J. Carlin Construction Co., which among other provisions, Section 14 thereof provided that the employer-con-

tractor herein must assume responsibility for transportation from the mainland to Rikers Island of men and material for all work done under said contract and that the City of New York shall not be held responsible for providing regular ferry service.

6. Prior to the time the said Edward Heaney sustained the accidential injuries herein above referred to, the only means of travel or transportation from the New York side to Rikers Island were the steamship "Observation" and the municipal ferry.

7. Prior to the time the said Edward Heaney sustained the accidental injuries herein above referred to, the P. J. [fol. 10] Carlin Construction Co., the employer herein, was under a contract with the owner of the steamboat "Observation," under which contract, the said employer guaranteed that the owner of the said steamboat "Observation" would receive $60.00 per day from the employer for transporting the employees of the said employer from the New York side to Rikers Island and from Rikers Island to the New York side, and that any deficit from the fares collected therefrom would be made by the said employer and any surplus remaining therefrom would be placed to the credit of the said P. J. Carlin Construction Co., the employer herein.

8. Prior to the time the said Edward Heaney sustained the accidental injuries herein above referred to, the said P. J. Carlin Construction Co., the employer herein, selected the steamboat "Observation" as the exclusive means of conveying the employees, including the claimant herein, from the New York side to Rikers Island and from Rikers Island to the New York side.

9. Prior to the time the said Edward Heaney sustained the accidental injuries herein above referred to, the said P. J. Carlin Construction Co., the employer herein, gave instructions to Edward Heaney, the claimant herein, to use the steamboat "Observation" as exclusive means of travel from the New York side to Rikers Island in connection with the work the claimant was to perform on Rikers Island for and in behalf of the P. J. Carlin Construction Co., the employer herein, and forced the said claimant to travel on the said steamboat "Observation," for which ferriage the claimant paid the fare of 10¢ a round trip, or 10¢ a day,

[fol. 11] and further gave the said Edward Heaney instructions forbidding him to travel from the New York side to Rikers Island by means of the municipal ferry. Therefore, the said Edward Heaney had no choice except in an emergency when the municipal ferry, which charged no fare, could be used.

10. Such transportation by means of the steamship "Observation" was included within and was part of the contract of employment between P. J. Carlin Construction Co., the employer herein, and Edward Heaney, the claimant, and was an incident of the claimant's employment.

11. At the time Edward Heaney sustained the accidental injuries herein above referred to, the status of the claimant and the employer herein was a matter of local concern, was subject to the regulation of the State and in no way worked prejudice to any characteristic feature of the General Maritime Law.

12. The claim of Edward Heaney aforesaid is within the jurisdiction of the Industrial Board and not such a matter as is subject to the exclusive jurisdiction of the Admiralty Law.

RULING OF LAW

This claim comes within the provisions of the Workmen's Compensation Law.

AWARD

Award of compensation is hereby made against P. J. Carlin Construction Co., employer, and The Travelers Insur-
[fol. 12] Company, insurance carrier, to Edward Heaney, injured employee, 4 weeks' compensation, covering the period from September 16, 1932, to October 14, 1932, at the rate of $25.00 per week, a total of $100.00 and this case is continued.

The employer and insurance carrier are to be credited with any and all payments heretofore made affecting this award.

DECISION

The previous decision of the Referee dated June 8, 1933, is hereby rescinded in the interests of justice.

Dated, New York, July 7, 1934.

State Industrial Board, Edw. Edwards, L. W. Hatch, Nellie Swartz.

BEFORE STATE INDUSTRIAL BOARD

NOTICE OF DECISION

Slavin & Leichtman, 11 West 42nd St., City. Mrs. Edward Heaney, Claimant, 3018 Kingsbridge Ave., City. Travelers Ins. Co., 100 E. 42nd St., City. P. J. Carlin Constr. Co., Employer, 405 Madison Ave., City:

You are hereby notified that at a hearing held before the Industrial Board on Dec. Cal. 6-8-33 a decision was made in the above case of Edward Heaney, decedent, as follows: [fol. 13] Claim disallowed upon the ground of no jurisdiction and no accident arising out of and in the course of employment.

The above copy of the decision and award is sent you pursuant to law.

Dated 6-8-33 SI closed.

Elmer F. Andrews, Industrial Commissioner.

BEFORE STATE INDUSTRIAL BOARD

NOTICE OF DECISION

December 18, 1933.

Edward Heaney, 3018 Kingsbridge Ave., N. Y. C. P. J. Carlin Constr. Co., 405 Madison Ave., N. Y. C. Travelers Ins. Co., 100 E. 42nd St., N. Y. C. Slavin & Leichtman, Esqs., 11 W. 42nd St., N. Y. C.:

The above case was presented to the Industrial Board on Nov. 8, 1933, for consideration at which time decision was reserved.

After careful review of the papers on file, the action of the Board under date of Dec. 8, 1933, was to find that at the time of the accident the claimant herein was in the course of his employment and that the Board has jurisdiction.

The previous decision of the Referee dated June 8, 1933, disallowing the claim is hereby rescinded and an award is [fol. 14] hereby made to claimant for 4 weeks' compensation covering the period from 9/16/32 to 10/14/32 at $25.00

per week a total of $100.00 and the case is continued to a Referee's calendar for further consideration.

Yours very truly, Elmer F. Andrews, Industrial Commissioner.

December 18, 1933.
Dict. by George M. Custer.
GMC:IL

BEFORE STATE INDUSTRIAL BOARD

MEMORANDUM OF DECISION

June 1, 1933.

Claim disallowed upon the ground of no jurisdiction and no accident arising out of and in the course of employment.

B. W. Nye, Referee.

BEFORE STATE INDUSTRIAL BOARD

Re Case No. 3,241,796

EDWARD HEANEY

vs.

P. J. CARLIN CONSTRUCTION COMPANY

MEMORANDUM OF DECISION

The referee disallowed the claim herein on the ground that the Industrial Board of the State of New York is with-[fol. 15] out jurisdiction, and that the accident did not arise out of and in the course of employment.

The claimant was employed by the general contractor who was doing construction work on Rikers Island. The claimant is a bricklayer. In order to get to Rikers Island the claimant was forced to travel on the steamboat Observation from the New York side to the island. For this ferriage the claimant paid ten cents a round trip, or ten cents a day. He had no choice, except in emergencies when the city ferry could be used, which charged no fare. There is evidence that the general contractor had a conversation

with a city authority, resulting in an understanding that the city ferry was not to be used. In the contract between the general contractor and the owner of the "Observation", it is guaranteed that the owner will receive $60 per day from the general contractor for transporting the general contractor's employees. Any deficit from the fares collected will be made up by the general contractor, and any surplus will be placed to the credit of the general contractor. The fares of the "Observation" were collected by an employee of the general contractor. This employee received $3 per week from the "Observation" and was on their payroll. This was in addition to his regular wages paid by the general contractor.

The Board is of the opinion that, with the above statement of facts, the claimant stepped into his employment the moment he stepped aboard the Steamboat 'Observation" and was, therefore, in the course of his employment when the explosion occurred on the eight o'clock trip from the New York side to Rikers Island, and the Board so finds. [fol. 16] As to the question of jurisdiction, there is no doubt in the mind of the Board but that the "Observation" itself and the men employed thereon were under the jurisdiction of the United States Government, but the claimant, who was a passenger, was of a different class. The status of the claimant and the employer was a matter of local concern.

The Board would differentiate the case at bar with that of Bell vs. West Island Corp., 221 App. Div. 744. In the Bell case, which claim was disallowed by the Court, the claimant, a real estate manager, was on a ferry operated by his employer and was en route to a real estate development on West Island. His contract of employment provided that he should supervise the f- ry boat. The Court ruled the case to be subject to admir..ty control and regulation, upon the ground that the decedent met his death while operating a boat in navigable waters.

In the case at bar the claimant was a passenger on a boat contracted for by his employer to transport his employees under a fixed schedule, and the boat limited its activities to such transportation during the day.

The Board also wishes to point out the difference between the case at bar and the decision of the United States Supreme Court (285 U. S. 502, April 11, 1932) Spencer Kel-

logg vs. Hicks & Company. The Court in the Hicks case emphasizes the interstate carriage by the "Linseed King" (between New York and New Jersey). In the case at bar the interstate question does not enter; it is purely a matter within the State of New York, and the general contractor is not entitled to limitation of liability under the Federal [fol. 17] Statutes. The referee's decision is reversed and the Board finds jurisdiction.

The case is continued to the referee's calendar for further consideration. Award is made for disability from September 9, 1932 to October 14, 1932 at $25 per week.

Nellie Swartz, Member, Industrial Board.

NS/MLH.
December 8, 1933.

BEFORE STATE INDUSTRIAL BOARD

EMPLOYEE'S CLAIM FOR COMPENSATION

1. Name of—Edward Heaney.
2. Address: 3018 Kingsbridge Ave., New York.
3. Sex—Male. Age—25. Married or single—Single.
4. Do you speak English? Yes. Nationality—U. S. citizen by birth.
5. State regular occupation—Bricklayer.
6. What were you doing when injured? Aboard workmen's carrier ("Observation").
7. Wages or average earnings per day, including overtime, board, rent and other allowances—$13.20.
8. Were you paid full wages for the day of accident? No.
9. Piece or time worker—Time.

[fol. 18] 1. Employer—P. J. Carlin.
2. Office address: Brooklyn.
3. Nature of business—General contractor.

1. Location of place where accident occurred—East River and 135 Street.
2. Name of Foreman—"Gene" Faust.
3. Date of accident—the 9 day of September, 1932, at 8 o'clock A. M.

1. How did the accident happen? Explosion aboard workmen's carrier ("Observation").

1. State fully nature of injury—General contusions, abrasions, internal injuries, shock, fractured ribs, injuries

to thorax, injuries to limbs (still under observation).

2. On what date did you stop work because of injury? September 9, 1932.

3. Have you returned to work? No.

4. Does injury keep you from work? Yes.

5. Have you done any work during period of disability? No.

6. Have you received any wages since your accident? No. If so, from and to what date? ——.

7. Has injury resulted in amputation? No.

8. Did you request your employer to provide medical attendance? Yes. Has he done so? ——.

[fol. 19] 9. Attending physician—Lincoln Hosp., 141 St. Southern Blvd.

10. Hospital (Name)—Lincoln Hosp., 141 St. Southern Blvd.; Burke Foundation, White Plains.

1. Have you given your employer notice of injury? Yes. When? Formally October 9 and Sept. 9, 1932.

2. If such notice was given, to whom? P. J. Carlin (Oct.) to foreman; Sept. 9 through the press date of accident also.

3. Was it given orally or in writing? Writing by mail (orally to foreman).

Dated October 9, 1932.

Signed by Edward Heaney, Mail address: 3018 Kingsbridge Ave.

BEFORE STATE INDUSTRIAL BOARD

Minutes of Hearings

Hearing before The Industrial Board, December 16, 1932.
Present—Bertrand W. Nye, Referee.

Appearances:

Slavin & Leichtman, attorneys for claimant, Max Leichtman of counsel.

E. A. Willoughby, attorney for employer and insurance carrier.

The Referee: Are you instituting civil action?

Mr. Leichtman: No, sir, we are resting on the compensation.

[fol. 20] The Referee: You intend to pursue under compensation?

Mr. Leichtman: Right.

OBJECTIONS TO ACTION

Mr. Willoughby: For the purpose of record, Mr. Referee, we desire to file our objections, first, on the ground that the accident did not arise out of and in the course of employment and, second, the Department of Labor is without jurisdiction in view of the fact that the accident in this case occurred on board a boat in a navigable stream; we contend that the catastrophe in this case was purely a marine disaster.

Hearing before The Industrial Board, April 27, 1933.
Present—Referee B. W. Nye, Esq.,

Appearances:

Claimant in person, represented by Max Leichtman on behalf of Slavin & Leichtman.
Mr. W. L. O'Brion, representing the employer and the carrier.

Mr. O'Brien: I think on the question of jurisdiction, I wish to make a preliminary objection on that score.
The Referee: The claimant is present. Be sworn.

EDWARD HEANEY, claimant, being duly sworn, testifies as follows:

OBJECTIONS TO ACTION

Mr. O'Brien: May I note for the record certain specific [fol. 21] objections too? On the question of jurisdiction, the insurance company objects to this hearing, because the subject matter and the inquiry is not within the jurisdiction of the Commission. The question that is involved is that the accident occurred in navigable waters in the United States, and this case is subject only to the Admiralty jurisdiction of the United States. I also wish to make the objection that the claimant was not at the time of the occurrence, an employee of this employer—the P. J. Carlin Construction Company. He was not then engaged in the course of the employment—and the injury did not arise out of and in the course of the employment.

The Referee: I will reserve on your motions. Overruled, for the time being.

Mr. O'Brien: Exception.

Direct by Mr. Leichtman:

Q. What was your occupation on September 9, 1932?

A. I was a bricklayer.

Q. How long had you been a bricklayer?

A. At this particular time I had been working there five days.

Q. You were employed by whom?

A. By the P. J. Carlin Construction Company.

Q. They were doing some work where,—on Riker's Island?

A. Yes.

Mr. O'Brien: I would like to have an objection to the last question. It calls for a conclusion on the day of the accident.

The Referee: That he was working for the Carlin Construction Company?

[fol. 22] Mr. O'Brien: That he was employed by the Carlin Construction Company on the day of the accident.

The Referee: Overruled.

Mr. O'Brien: Exception.

Q. Where did you live on September 9, 1932?

A. At 3018 Kingsbridge Avenue, Bronx.

Q. In going to work how did you go?

A. I came down on the trolley car down to 138th Street, and at 138th Street I transferred from one trolley car a few times to the 138th Street car, and I stopped at 136th Street, one block west of the East River, where I boarded the boat.

Q. The East River and what street?

A. 136th Street.

Q. You were on the Steamboat "Observation" at the time of the accident on September 9, 1932?

A. Yes.

Mr. Leichtman: Will the carrier concede that this is an exact copy of the bids between the contractors and the City of New York? I want to point out that this was part of the contract,—page 14.

Mr. O'Brien: I will concede that that was a clause under the general conditions for all contracts applying to the five contracts entered into by the City.

Mr. Leichtman: You will concede that that applied to the P. J. Carlin Construction Company?

Mr. O'Brien: That it applied to all the contracts who—all the contractors who contracted with the City, including the P. J. Carlin Construction Company. It was not a par-
[fol. 23] ticular clause of the P. J. Carlin Construction Company,—but of the general contract with all the contractors.

Mr. Leichtman: It is on their contracts, page 14, under the heading of transportation: Each contractor shall investigate the existing means of transportation to and from Rickers Island. The City shall not be held responsible for providing regular ferry service. The contractor must assume the responsibility of the transportation from mainland to the island of men and material for all work done under this contract.

Mr. O'Brien: My objection was not to the words of the clause, but to all the evidence, upon the ground that it is a contract between the contractors and the City of New York.

The Referee: You do concede, however, that it was a part of the contract?

Mr. O'Brien: Between the five contractors and the City of New York. It was a clause in each contract. I object to the materiality of the relationship to this bearing.

The Referee: Overruled. You may have your exception.

Mr. Leichtman, cont'g:

Q. Now, were you given any instructions by any one on behalf of the P. J. Carlin Construction Company as to how you were to go to Rikers Island, and from there to the shore?

A. Yes.

Q. Who gave you the instructions?

A. The foreman,—Gene Faust.

[fol. 24] Q. What were these instructions?

A. That we should take the Steamboat "Observation". Not to ride on the City ferry.

Q. Was there anything further said regarding the means of transportation?

A. Yes. They were to be given ten cents for our fare.

Q. Was anything said as to what would happen to you if you were to use the City ferry?

A. We were not allowed to use it.

Q. Was there anything said to you about what would happen if you used any other means,—other than the "Observation"?

A. We were absolutely forbidden to ride on the City boat. We had to use the "Observation".

Q. I show you a paper. Did you ever see this before?

A. Yes.

Q. Where did you see it?

A. On the time shed. I should say it was in the center of the operations at that time on Rikers Island.

Mr. Leichtman: I offer that in evidence.

Mr. O'Brien: That is objected to as incompetent, irrelevant and immaterial.

The Referee: Overruled. Received in evidence.

Mr. O'Brien: Exception.

The Referee: That is marked Exhibit 1, as of today's date.

Q. I show you another paper, and ask you if you have ever seen that before?

A. Yes.

Q. When and where did you see that?

A. It was posted on the time shanty.

Q. At the time you were working for the P. J. Carlin Construction Company?

A. Yes.

[fol. 25] Mr. Leichtman: I offer that in evidence.

Mr. O'Brien: Objected to as being incompetent, irrelevant and immaterial.

The Referee: Overruled. Received in evidence and marked Exhibit 2 as of this date. I think perhaps if you identified your Exhibit 1 a little more, Mr. Leichtman, it might be more valuable,—where he got it from?

Mr. O'Brien: Exception to the last ruling.

Q. I show you Exhibit 1 and ask you where you received this? That was after your accident?

A. Yes. It was received at the union in union headquarters.

Q. Who gave it to you?
A. Mr. Smith, our delegate.
Q. Can you get him here?
A. Yes.
Q. Outside of the Steamer "Observation," what other means of transportation was there from the Bronx to Rikers Island?
A. The City ferry.
Q. You have testified as to the orders regarding the City ferry. What was the conversation with the foreman?
A. That we couldn't use the City ferry.
Q. When were you told by your foreman that you should not use the City ferry but the "Observation"?
A. The day we were hired.
Q. What day was that?
A. That was my fifth day working. I was working there five days.
Q. The day of the accident was the first,—fifth day you were working?
A. I hadn't started to work that day. It would have been my sixth day.
[fol. 26] Q. What were your wages with the P. J. Carlin Construction Company?
A. $1.65 an hour.
Q. How many hours were you to work a day?
A. Eight hours.
Q. How many days were you to work a week?
A. Five days, I worked.
Q. What daily amount would that make?
A. $13.20 a day.
Q. At the time of the accident, were you rendered unconscious?
A. Yes.
Q. When you recevered consciousness you found yourself in bed in the hospital?
A. When I regained consciousness I found myself on the floor of the hospital.
Q. What hospital?
A. Lincoln Hospital.
Q. How long did you remain there?
A. Two weeks.
Q. After that where did you go?

A. To the Burke Foundation.

Q. Where is that?

A. In White Plains. I was sent there and in about three weeks I developed a toothache, and they had to send me home.

Cross by Mr. O'Brien:

Q. At the time of this occurrence you were on the Steamer "Observation"?

A. Yes.

Q. The "Observation" was navigating what water?

A. The East River.

Q. At the time she had left her dock?

A. Yes.

Q. She was out in the stream?

A. Yes.

Q. There was a dock or pier, and there were several other piers in the vicinity where other vessels were moored?

A. Yes.

Q. And this water,—the East River was where she was making regular trips,—and on this water there were sailing [fol. 27] craft and vessels of various kinds?

A. Yes.

Q. And the "Observation" made various trips during the course of the day from East 136th Street on the East River over to Rikers Island?

A. Yes.

Q. Trips over and trips back?

A. Yes.

Q. When this explosion occurred, you were thrown into the river?

A. Yes.

Q. Regularly when you went from your house to your work, you took the trolley car that you have spoken of,—or subway? Which was it?

A. I could do either. I usually took the trolley car.

Q. You took the trolley car down to a point near the pier?

A. One block.

Q. And then walked over to take the boat?

A. Yes.

Q. And for your transportation you paid the regular fare, five cents?

A. Yes.

Q. On the "Observation" you paid that?

A. Yes.

Q. That was ten cents for the round trip?

A. Yes.

Q. Which gave you the right to go back on the boat when your work was over for the day?

A. Yes.

Q. You were doing no work on the boat?

A. No.

Q. Were you standing or sitting there—on what part of the boat? What were you doing?

A. I was standing.

Q. On what part of the boat?

A. On the lower deck.

Q. The Municipal ferry boat also ran from the Bronx over to Rikers Island?

A. Yes.

[fol. 28] Q. And that ferry boat left from the point near where the "Observation" left?

A. 138th Street.

Q. Two blocks away?

A. Yes.

Q. Did you ever ride on the Municipal ferry boat at any time?

A. No. Never.

Q. Did you ever have occasion when your work continued beyond the regular trip, to go back on the Municipal ferry boat?

A. No.

Q. You know that that frequently happened to some of the other men?

A. I only know of one case.

Q. You do know of one case where it happened?

A. Yes.

Q. But as a rule you got through in time to go and take the Steamer "Observation"?

A. Always.

Q. What time were you supposed to start your work over at the island?

A. Eight o'clock.

Q. This accident happened a little after eight o'clock, didn't it?

A. Yes.

Q. If your work was supposed to start in the morning at eight o'clock,—your work on the island, how did it happen you were taking this eight o'clock boat?

A. I just miss the half past seven boat by about two seconds.

Q. On the other days when you worked over there when you got to the island,—would you get any sort of check that you returned to the timekeeper's office at the end of the day?

A. Yes.

Q. You wouldn't go to work in the morning from the "Observation" without going to the timekeeper's office when you reached there,—to report?

A. We would report first.

Q. And then they would give you some sort of identification check?

A. Yes. They would hand you a brass check.

[fol. 29] The Referee (Int'g): Then when you got the brass check,—after you got the brass check you would be ready to start in working?

Claimant: Yes.

The Referee: In other words, you had to get the brass check preliminary to starting your job?

Claimant: Yes.

Mr. O'Brien, cont'g:

Q. Then when you finished your day's work what did you do with the brass check?

A. Dropped it into the time office in a box that was there to receive it.

Q. At the time you were quitting?

A. Yes.

Q. Your pay began at the time that you got the brass check and ended at the time you turned it in?

A. Yes.

Q. Now this ten cents fare that you paid on the "Observation", you paid that out of your own pocket?

A. Yes.

Q. You were not reimbursed for that at all?

A. No.

Q. In reference to Exhibit 1 of today, the paper that was put in evidence,—when did you get this?

A. I just can't tell you when I got that.

Q. Did you ever see this before Smith gave it to you?

A. Yes.

Q. Where did you see it?

A. Posted on the time shanty.

Q. Was the other document, Exhibit 2, given you at the same time?

A. Yes.

Q. Had you ever seen this paper before it was given to you?

A. Yes.

Q. How many trips did this Steamer "Observation" make in the morning?

A. One about half past seven,—one about a quarter to [fol. 30] seven, and one at eight o'clock.

Q. Then going back in the afternoon, there were also various trips when you came back from work?

A. One about a quarter to five, one about a quarter after five.

Q. Were there times when the boat went over at other times?

A. I don't think so.

Q. The only time you rode on it——

A. (Int'g) The only time it went over to the island at other times was when we knocked off early on account of rain,—it would come over in that event.

Q. Then it would make trips at other times?

A. Yes. It would only make trips to take us fellows off the Island.

Redirect by Mr. Leichtman:

Q. Were you ever given permission by the foreman or any one from the P. J. Carlin Construction Company to use the City Boat?

Claimant: No.

Mr. Leichtman: Did you ever use the City boat?

Claimant: No.

The Referee: As far as you know, was the Steamer "Observation" used for any other trips at that time,—other than those trips that you have mentioned for these employees,—anywhere else around the city?

Claimant: Yes, on Sunday it went out and took special excursions.

The Referee: On week days, did it?

Claimant: No.

[fol. 31] Mr. O'Brien: Do you know that this boat made moonlight excursions?

Claimant: Yes, you are right. I heard that.

Recross by Mr. O'Brien:

Q. On this boat, there were various classes of workmen,—that is, there were bricklayers,—iron workers and men in different trades and men working for different employers when they got to the island?

A. Yes.

Q. They were not simply bricklayers?

A. No.

Q. This boat,—the "Observation", was used by the various workers,—by all the workers employed on the construction of the Rikers Island Penitentiary?

A. Yes.

Q. You were asked if your employer ever gave you permission to ride on the City ferry? Did you ever ask him?

Mr. Leichtman: I object to the question. It is immaterial.

The Referee: Overruled.

A. Well, no. I never ased him. I figured——

Q. (Int'g.) The question is answered. You never asked him.

A. No.

Q. This Steamboat "Observation" was how big a boat?

A. I couldn't say.

The Referee: You will stipulate over eighteen tons?

Mr. O'Brien: Yes.

The Referee: That is about all you care.

Mr. O'Brien: Was there a rating permitting her to carry two hundred and fifty passengers?

[fol. 32] Mr. Leichtman: Yes. It was a large boat. We concede that.

Mr. O'Brien: It was conceded on the record that it was a large steam passenger boat, with a capacity of two hundred and fifty passengers.

Mr. Leichtman: We concede it was a large steam boat, which could carry two hundred and fifty passengers.

The Referee: There is no question at all that the claimant was disabled for a time,—totally disabled? Any question about that?

Mr. O'Brien: No, I don't think there is.

The Referee: If you will stipulate that there is a certain disability as the result of this accident,—so that if jurisdiction is held I can make an award and you can take your appeal,—I know you are not going to abide by my decision,—seeing that will save you the question of medical expenses for both of you until you get your question of jurisdiction——

Mr. O'Brien: I will stipulate it was at least five weeks.

The Referee: At twenty-five dollars at the maximum rate. You can make that a tentative rate, and you can also stipulate that in the event of the final award, the proper rate will take that into consideration. That means that you will be credited with that.

[fol. 33] Hearing before The Industrial Board May 5, 1933.

Present—B. W. Nye, Referee.

Appearances:

Wm. L. O'Brion, Esq., representing employer and insurance carrier, accompanied by W. B. Davis, Esq.

Slavin & Leichtman, 11 W. 42nd Street, New York, N. Y., attorneys for claimant; Mr. Max Leichtman, of counsel.

The Referee: Do you want to offer in evidence part of the specifications, counsel?

Mr. Leichtman: Yes, sir. It is practically conceded that was in the contract, the part I want to put in.

The Referee: Yes. Is that a copy you can let us take, not only for this case but for other cases?

Mr. Leichtman: Yes, sir. I have finished with it as far as this record is concerned.

The Referee: Was this read?

Mr. Leichtman: Clause 14 was read in.

James Smith, 1610 Mahan Avenue, Bronx, N. Y., being duly sworn, testified:

Direct by Mr. Leichtman:

Q. What is your occupation, Mr. Smith?

A. Business Agent for Bricklayers' Union, Local #37, Bronx, New York.

Q. You know Mr. Heaney the claimant in this case?
A. I do.
[fol. 34] Q. I show you this paper, marked "Exhibit 1," ask you if you ever saw that paper before?
A. Yes, sir, I saw that paper. I saw one similar. I saw that one or one similar.
Q. Did you give such paper to Ted Heaney?
A. Yes, that or another one.
Q. Where did you first see that paper?
A. I saw those papers or similar ones to it, on what they call the tool house on Rikers Island. I gave them to Brother Heaney then, too.
Q. About what time of the year—what time of the year did you see them on that tool house on Rikers Island?
A. I had seen them day in and day out previous to the explosion.
Q. Prior to the month of September, 1932?
A. Yes, sir.
Q. For how long a period had you seen this posted?
A. I had seen them posters. I go over on that island about every other day or so. I saw them posted there a few days. I would look them over when I pass. They were posted up at the tool house, I don't say just them but others similar to them.
Q. Did you make your visit to the island from the time that P. J. Carlin started to work there?
A. Before I took office the job had started. I started last January 5th, one year ago.
Q. From January 5th did you start to make your visits?
A. I did.

Mr. O'Brion: This is 1932?
Witness: Yes, sir.

Q. I show you another paper, and ask you if you ever saw this or a similar paper in the tool house?
A. Yes, sir. I am sure that's the one I gave to Brother Heaney. That's the second one I gave to Brother Heaney.
[fol. 35] Q. Where did you get the two papers you gave to Mr. Heaney?
A. One of my shop stewards, by the name of Frank Delapana took them off the toolhouse the morning of the explosion and gave them to me, and said, "The men might need those when their case comes up in court," or words similar to that.

Q. This toolhouse on Rikers Island, where was it, or whose was it?

A. J. P. Carlin.

Q. J. P. Carlin kept the tools in that toolhouse?

A. What we call the toolhouse is a shack where the bricklayers put their tools at night and their clothes and lock it up. The shop steward keeps the key. No one can go in unless the shop steward.

Q. This was a toolhouse of the employees of P. J. Carlin?

A. This was one of them.

Cross by Mr. O'Brion:

Q. Mr. Smith, you say those papers were handed to you by someone else?

A. By one of my shop stewards, Delapana.

Q. Was he employed regularly on the island, or was he employed by the union?

A. He was employed regularly on the island.

Q. Did he give you any other paper besides those two papers?

A. Just two papers.

Q. When did you give them to Mr. Heaney?

A. Shortly after he came out of the hospital.

Q. That's approximately how long after the explosion?

A. I just don't recollect that. I didn't know I was going to be called down here.

Q. Can't you give it to us approximately?

A. I guess he was in the hospital.

Q. I am not asking you that. I am asking approximately how long after the explosion you gave him the paper?

A. I would say possibly three months after.

[fol. 36] Q. Have you seen them at any time since you gave them to him?

A. No, I have not.

Q. Are you sure these are the two papers you gave him?

A. (Peruses same.) Yes, I am sure. I am sure after reading them.

Redirect by Mr. Leichtman:

Q. You know, Mr. Smith, the contents of those two papers were posted on the toolhouse of Rikers Island?

A. Either they or similar ones. If I recall right—I am not positive of this but I believe there was a little bulletin

board down towards the ferry, if I remember right, and I think I have seen similar posters on them. I won't swear to that statement I just made.

Q. You recall this morning on the toolhouse you did find, see papers regarding the "Observation"?

A. Yes, sir.

JOHN FRANCIS CARLIN, Bright Waters, L. I., being duly sworn, testified:

Direct by Mr. O'Brion:

Q. Mr. Carlin, are you an officer of the P. J. Carlin Construction Company?

A. I am.

Q. And were you such officer in the year 1931?

A. I was.

Q. What office do you hold?

A. Treasurer and secretary.

Q. Did you hold such office at that time?

A. I did.

Q. Did you enter into a contract—that is, did the P. J. Carlin Construction Company enter into a contract with the City of New York in connection with any work being [fol. 37] performed on Rikers Island?

A. Yes, it did.

Q. Where is Rikers Island?

A. It is about opposite 140th Street. I should say between there and Long Island City.

Q. In the East River?

A. In the East River.

Q. How far is it from 136th Street, the Bronx, to Rikers Island?

A. Approximately one mile or two miles—from one to two miles.

Q. Is Rikers Island owned by the City of New York?

A. I believe so; yes, sir.

Q. What institution is there?

A. The penitentiary building.

Q. Are there any other buildings on the island except those connected with the penitentiary?

A. I think not.

Q. The contract which was entered into with the City of New York, will you please state whether that contract was

entered solely by your company or were there other companies contracted with the city?

Mr. Leichtman: I object to it on the ground it is irrelevant and immaterial.

The Referee: Overruled.

Mr. Leichtman: Exception.

Witness: There were other contractors in the City of New York engaged in the same work.

By Mr. O'Brion:

Q. How many were there altogether?

A. Five.

Q. Who contracted with the City?

A. Who contracted with the City separately?

Q. The proposals for those contracts were all contained in a bound printed volume, were they not?

A. Yes, sir.

[fol. 38] Q. And in that contract there were certain clauses entitled "General Conditions For All Contracts"?

A. That is correct.

Q. And those conditions applied to all five contracts?

A. Yes.

Q. And was Clause 14 in the "General Conditions for all Contracts" the clause entitled "Transportation" which has been put in evidence here? Was that a clause which applied to all of the five contracts?

A. It did. It was in each of the five contracts.

Q. The contracts with the different contractors were numbered, were they not?

A. Yes, sir.

Q. You were contractor under what contract?

A. Contract number one.

Q. That did not include the power plant, plumbing work, heating and refrigeration nor electrical work?

A. It did not include any of those.

Q. Who were the other four contractors with the City?

A. The Arc Electric Construction Company; Charles Darmstadt; Edward B. McGovern; Erickson Equipment Company. You asked for the others?

Q. What was the date of your contract with the City?

A. December 29th, 1930.

Q. At that time was there a ferry which ran from the Bronx to Rikers Island?

A. Yes, there was.
Q. And that ferry was what?
A. Municipal Ferry.
Q. I believe you stated there are no buildings on Rikers Island except those connected with the penitentiary?
A. There are none that I know of.
Q. Subsequent to the time when you executed the contract with the City did you enter into any contract with anyone in reference to the steamship "Observation"?
A. We did.
[fol. 39] Q. With whom was that contract made?
A. George I. Forsythe.
Q. Have you a copy of that contract with you?
A. I have, yes, sir.
Q. Will you please produce it?

Mr. O'Brion: I offer it in evidence.

By Mr. Leichtman:

Q. This is an exact copy of the original, Mr. Carlin?
A. Yes.

The Referee: Received, marked "Exhibit 1" as of this date.

By Mr. O'Brion:

Q. How was that contract accepted by George I. Forsythe, in writing or orally?
A. It was accepted orally.
Q. Was that the contract under which George I. Forsythe was operating the steamship "Observation" on the date of the explosion?
A. It was.

Mr. Leichtman: I object to the form of the question. I will allow it as to whether——
The Referee (Int'g.): Overruled.
Mr. Leichtman: Exception.

By Mr. O'Brion:

Q. Did the P. J. Carlin Construction Company own the steamship "Observation"?
A. It did not.
Q. Did it employ any of the crew?
A. It did not.

[fol. 40] Mr. Leichtman: That is objected to. The contract speaks for itself.

The Referee: Overruled.

Mr. Leichtman: Exception.

By Mr. O'Brion:

Q. Do you know whether the Municipal Ferry was used from time to time from the time you entered into the contract with the City to convey workers to Rikers Island?

Mr. Leichtman: Objected to as incompetent, irrelevant and immaterial, not binding on Heaney.

The Referee: Overruled.

Mr. Leichtman: Exception.

Witness: It was used at times.

Mr. O'Brion: Until the steamship "Observation" began running between East 136th Street and Rikers Island how did the men get to and from the island for their work?

Mr. Leichtman: Objected to as incompetent, irrelevant and immaterial.

The Referee: Overruled.

Mr. Leichtman: Exception.

Witness: By the Municipal Ferry.

Mr. O'Brion: Mr. Carlin, did the P. J. Carlin Construction Company operate or control the Steamship "Observation"?

Mr. Leichtman: Objected to.

Mr. O'Brion: In its navigation as a ferry from East 136th Street to Rikers Island?

Mr. Leichtman: Objected to as calling for a conclusion.

[fol. 41] The Referee: Yes, I think that does. I will sustain the objection.

Mr. O'Brion: I may have an exception to your Honor's ruling?

The Referee: Yes.

Mr. O'Brion: Did the P. J. Carlin Construction Company pay the wages of any of the crew of the "Observation"?

Mr. Leichtman: Objected to. There is a contract in evidence which defines relationship between the "Observation" owners and P. J. Carlin. I don't think we should have any evidence on that.

The Referee: Do you claim, Counselor, there is any relationship other than exists by this contract, "Exhibit 1"?

Your question, in a way you are asking for a construction of this contract. I assumed upon receipt of "Exhibit 1" that stated the relationship between the owners of the "Observation" and P. J. Carlin Construction Company. This testimony is designed either to construe this contract or as to various terms, I don't know which.

Mr. O'Brion: If the claimant's attorney will concede that that contract limits the relations there will be no need for any other questions on that.

Mr. Leichtman: I don't think any such concession should be called for. Mr. Carlin has testified that contract was in effect at the time the "Observation" was running. That's his testimony.

The Referee: True!

Mr. O'Brion: There has been an effort, Mr. Commissioner, apparently by the introduction of the Exhibits One [fol. 42] and Two, to show some connection between the P. J. Carlin Construction Company and the "Observation". At least it is possible he will argue from that fact that there was, notwithstanding this contract, something in the nature of operations or control. So I think it is clearly competent for me to show by this witness what the facts were in that connection.

The Referee: As the record stands at the present moment I should not look beyond this to define the relationship. He is prepared to show the relationship between the owners of the "Observation" and the operation of the "Observation" and the P. J. Carlin Construction Company. All of the testimony I have sustained the objection, has been upon the ground I considered it was either to vary the terms of this contract or to construe it. That's the theory on which I have excluded it.

Mr. O'Brion: In view of your Honor's statement, I withdraw the last question. You may examine.

Cross by Mr. Leichtman:

Q. Mr. Carlin, were you personally at Rikers Island during these operations?

A. Very seldom.

Q. This is Mr. Heaney. Do you know him?

A. Yes, I do.

Q. Did you ever give Mr. Heaney instructions as to how he was to go to and from Rikers Island?

A. Never.

Q. Did you ever tell him he had permission to use the City ferry?

A. I did not.

[fol. 43] Q. How long before this explosion had the men employed by you been going back and forth from Bronx to Rikers Island on the Steamship "Observation"?

A. They were going across at two different periods, one for, I think four months immediately preceding, and for about a similar period some time previous to that.

Q. So that for four full months prior to the time of the explosion the "Observation" had been used as the exclusive means of getting the men to and from the island?

A. I don't know whether the City ferry was used during that period or not.

Q. Do you know whether signs were posted on the toolshed advising the men as to the hours the "Observation" made the trips and advising them as to their conduct on the "Observation"?

A. No, I never knew any signs had been posted. Our field office prepared a schedule in accordance with that contract. That was supplied to George I. Forsythe.

Q. Did you ever give your foreman or any of the men, give instructions how the men were to travel to and from Rikers Island?

A. No.

Q. Did anybody else ever give such instructions?

A. Not that I know of.

Q. Have you your records with you to show how much money your company paid to George I. Forsythe, or how much was paid by George Forsythe to your company?

A. No, I haven't.

Q. Do you know how much was paid either way?

A. No.

Q. Your firm were the general contractors there?

A. We were general contractors for the contract number one.

Q. Right! And you had various sub-contractors?

A. Yes.

[fol. 44] Q. Mr. Carlin, do you know if notices were posted in conspicuous places on Rikers Island stating your firm was carrying compensation insurance?

A. I think so. I think that is very likely. I don't know it personally, if that is your question.

Q. It was the practice of the company to post such notices in a conspicuous place?

A. Yes. I understand it to be a matter of law.

Q. Did Mr. Heaney ever send you a notice to the effect he would not be covered by the terms of the Compensation Law?

Mr. O'Brion: That is objected to as incompetent, irrelevant and immaterial.

The Referee: Overruled.

Witness: Will you repeat it?

Mr. Leichtman: Did Mr. Heaney ever send you a notice he elected not to be covered by the terms of the Workmen's Compensation Law?

Witness: I never saw such notice. I don't know of any.

By the Referee:

Q. Who was the man in charge?

A. Our superintendent at the island?

Q. Yes.

A. James Bell.

Q. Do you know whether he gave the men any instructions as to the means of transportation to and from the island?

A. I believe he did not.

Q. You have no knowledge on that subject?

A. I have no personal knowledge.

Q. Did you require your sub-contractors to send your men by the "Observation"?

A. No, I didn't tell them anything about it.

[fol. 45] Q. It is a fact the City ferry was made use of only in the times of emergency?

A. It was made use of at the start of the contract altogether, and then there were various times I think where it was used in emergencies.

Q. Did you ever have any conversation or communication with the City or officials of the City to the effect the employees of contractors or subcontractors engaged in the work were not to use the City ferry?

A. Yes, we had instructions from them.

Q. It is a fact, is it not, the City ferry charged no fare?

A. I believe so. It charges no fares.

Q. It is also a fact the men riding on the "Observation" were required to pay fares?

A. The fare was charged to them.

LESTER ALOYSIUS FORSYTHE, 136 Belmont Avenue, West Brighton, Staten Island, being duly sworn, testified:

Direct by Mr. O'Brion:

Q. Are you the son of George I. Forsythe, deceased?

A. Yes, sir.

Q. Were you employed by him in connection with the business operations of the Steamship "Observation"?

A. I was.

Q. Do you know the contract under which the Steamship "Observation" was being operated at the time of the explosion?

A. Yes, sir.

Q. I hand you a document marked "Exhibit 1" of this date, and ask you to examine it and state whether or not that was the contract under which the boat was being operated?

A. Yes, this is a copy of the contract.

[fol. 46] Cross by Mr. Leichtman:

Q. Mr. Forsythe, what was your position?

A. I was engaged in procuring business for the boat.

Q. Did you ever travel on the "Observation"?

A. Yes, sir.

Q. Did you ever travel on the "Observation" while the men employed by Carlin and other contractors were being transported there?

A. Yes, sir.

Q. Who collected the ten cent pieces from these men?

A. Sometimes our deckhand and sometimes the collector.

Q. Who is the collector?

A. The last collector?

Q. When you say "the collector" whom do you mean?

A. The collector was the man we assigned to that work.

Q. Did you ever get the money from any employee of P. J. Carlin & Company? I mean in a lump sum?

A. Yes, we take the money from the collector each morning.

Q. Isn't it a fact most of the time one of the representatives of P. J. Carlin did give the collector the money and turned it over to you?

Mr. O'Brion: That is objected to as calling for a conclusion, is incompetent, irrelevant and immaterial.

The Referee: Overruled.

Witness: The man who collected the fares on the boat did so at our solicitation.

Mr. Leichtman: I move to strike that out.

The Referee: Granted.

Mr. O'Brion: Exception.

Mr. Leichtman: My question was, isn't it a fact most of [fol. 47] the time one of the representatives of P. J. Carlin & Company collected these ten cent pieces and turned them over to you?

Mr. O'Brion: Same objection.

The Referee: Overruled.

Mr. O'Brion: Exception.

Witness: He was employed by us when making collections, not by P. J. Carlin.

Mr. Leichtman: I move again to strike it out as not responsive.

The Referee: It is not responsive, but I will not strike it out. Continue with that.

Mr. O'Brion: Your Honor did or did not strike it out?

The Referee: I did not strike it out. It does not answer the question at all as a matter of fact.

Witness: I really wouldn't know who the collector was employed by, whether he was employed by Carlin or Darmstadt or what company.

Mr. Leichtman: Do you know who generally turned the money over to you?

Witness: The last collector was Miller.

By Mr. Leichtman:

Q. Don't you know Miller was employed by J. P. Carlin & Company?

A. Not for sure I do not.

Q. You are not certain?

A. No.

Q. Was Miller one of your deck hands?

A. No.
Q. Was Miller one of your crew?
A. No.
Q. The only relationship you had with Miller was that Miller turned the money over to you or your representative?
A. No, Miller was employed or engaged by my father to collect the fares each morning.
[fol. 48] Q. Were you present when this employment arrangement was made between your father and Miller?
A. I was very frequently present there in the morning.
Q. Were you present at the time the employment arrangement was made?
A. No, I don't think I was.

Mr. Leichtman: I move to strike out "Miller was employed by my father to collect fares" as being purely hearsay.
The Referee: It will have to go out without he can explain how he has the knowledge. The motion is made to strike out that answer because you have testified you were not present when the contract was entered into with Miller. How do you know your father had a contract with Miller?
Witness: I knew Miller and knew he knew most of the workmen employed on Rikers Island. I know the reason my father selected him was that it wasn't necessary for him to see the passes for the working slips in the morning and there was no delay in the line. He just collected the fares.

By the Referee:

Q. How did Miller know the men who worked on Rikers Island?
A. He had been employed there for some time.
Q. On Rikers Island?
A. Yes.
Q. By whom?
A. I don't know what company he was employed by.

Mr. O'Brion: On the island, I will concede he was employed by Carlin.
[fol. 49] The Referee: Counsel wants to know how it is you know he was working for your father?
Witness: Because Miller used to turn the receipts over to me.

By Mr. Leichtman:

Q. That's all you know about it. You used to get the receipts from Miller?

A. I know more than that about it.

Q. Tell us what more you know?

A. We had other collectors besides Miller. The arrangement was that Miller would, or whoever the collector would be, would collect the fare in the morning, and on the last trip over would turn over to us the amount collected.

Q. You had a brother, Alexander, did you?

A. Yes.

Q. Is he still alive?

A. Yes.

Q. As a matter of fact he was the one who was very frequently on the boat, wasn't he?

A. Yes, sir.

Q. He was there every day, wasn't he?

A. Yes, or most every day.

Q. Did you take care of the books for your father?

A. I did.

Q. At stated intervals did either your father give P. J. Carlin any money or did P. J. Carlin give your father any money?

A. The P. J. Carlin Company gave my father money.

Q. In addition to the moneys collected from these men?

A. That's right.

Q. You have no idea who this man Miller was, have you?

A. Yes, I know he was an employee on Rikers Island. I knew he knew most of the men who worked over there.

Mr. Leichtman: That's all.

[fol. 50] Redirect by Mr. O'Brion:

Q. The moneys that Carlin Company paid your father were to make good the guarantee under this contract which has gone in evidence?

A. That's right, the difference collected each day as against their guarantee.

Q. Was it part of your business in your employment for your father to make up the payrolls?

A. Yes.

Q. Did you make up the payrolls for the "Observation"?

A. I did.

Q. Do you know whether or not this man Miller was paid any sum by your father?

A. I do.

Q. How much?

A. He was allowed $3.00 per week.

Mr. Leichtman: I move to strike out "He was allowed $3.00 per week."

The Referee: Overruled.

Recross by Mr. Leichtman:

Q. Have you any books showing the business transactions about September, 1932?

A. Yes, I have.

Q. What are those books?

A. Most of them were subpœnaed or taken by the District Attorney of Bronx County about one week or ten days after the accident.

Q. Did you personally ever pay Miller $3.00?

A. I did.

Q. How often?

A. I paid him two or three times in July, during the period of time my father was off the boat.

Q. Your father asked you to give him the $3.00?

A. Yes, sir.

Q. It was in the nature of a tip, wasn't it?

[fol. 51] Mr. O'Brion: That is objected to, calling for a conclusion, is incompetent, irrelevant and immaterial.

The Referee: Overruled. That question is this, whether or not by reason of a contract or an understanding you were required to pay him that money or whether it was a mere gratuity. That's what he means by a tip. I want you to understand the question. The objection is overruled. You may answer.

Mr. O'Brion: Exception.

Witness: Will you repeat it?

The Referee: Whether you were under obligations to pay him that $3.00 by reason of an understanding or agreement with him or whether you gave it to him as a gratuity, as a tip without a right to demand it.

Mr. O'Brion: The same objection and exception.

The Referee: The same ruling.

Witness: Miller never demanded it of us.

By the Referee:

Q. Did you agree at some time to pay it to him?
A. Yes, we did.
Q. Did you tell him you would give him that amount of money for specific work?
A. Each morning if he would take care of the fare.
Q. Was it agreed you would pay him that money for certain specified designated work?
A. Yes.

By Mr. Leichtman:

Q. Did you fix the hours Mr. Miller was to work for you?
A. Except that he was there on the first trip in the morning and left the boat on the last trip.
[fol. 52] Q. He had to wait for the last trip?
A. Yes.
Q. You stated before you were not present when your father made arrangements with Miller?
A. No, I wasn't.
Q. When you say you promised to pay $3.00 per week you are not stating that of your own knowledge?
A. I paid him very frequently.
Q. All you know is you gave it to him?
A. Yes.
Q. Your father asked you to give it?
A. We carried him as part of the boat payroll. I make up the payroll. We charge $3.00 for Miller.
Q. You charged it up as expenses of the boat?
A. Yes.
Q. That wasn't because of any conversation you had with Miller? You didn't promise to give Miller $3.00?
A. No, I didn't hire him.
Q. You were not present when your father had the arrangements with Miller?
A. No.
Q. All you know is you were told to add $3.00 to the payroll and give it to Miller?
A. Yes, for his services each week.
Q. That's all you know?
A. Yes.

Redirect by Mr. O'Brion:

Q. You were not present, were you, when your father made the contract with the engineer of the boat?

A. No.

Q. But you know the engineer reecived a certain salary?

A. Yes.

Q. You were not present when your father made the contract with the deck hands of the boat?

A. No.

Q. You know the deck hands received a certain salary?

A. Yes.

Q. And you know the same thing as to Miller's $3.00?

[fol. 53] Mr. Leichtman: I object to that.

The Referee: Overruled, I will receive it.

By the Referee:

Q. How many trips did the "Observation" make per day to Rikers Island?

A. In the morning we made three trips, six—6:45; 7:30 and 8 o'clock.

Q. Did Miller make all three of these trips?

A. Yes.

Q. In the afternoon how many were there?

A. The first trip back was 4:30; 5 o'clock, between 5 and 5:15, and then 6 o'clock.

Q. Did Miller make all three?

A. Not the night trips.

Q. Only the morning?

A. Yes.

By Mr. O'Brion:

Q. Mr. Forsythe, during this time that the "Observation" was running between East 136th Street and Rikers Island, did she make any moonlight excursions?

A. Yes.

Q. How often?

A. On an average of two or three per week.

Q. What did she do on Saturdays or Sundays?

A. She always had excursions during the summer months, for the excursion season.

Q. But for the four months at least preceding this accident during the morning and evening the "Observation" was on hand to take Carlin's men to and from the Bronx to Rikers Island?

Mr. O'Brion: That is objected to as it is covered by the [fol. 54] contract, the time when the "Observation" should be doing that work.

Mr. Leichtman: I asked whether it was,——

Witness: From Monday to Friday.

The Referee: Overruled. I will receive it.

Mr. O'Brion: Exception.

Recross by Mr. Leichtman:

Q. Those three trips in the morning took how much of Miller's time?

A. Exclusive of his own traveling time to Rikers Island he was there from 6:30 until 8 o'clock, then he got off the boat on the last trip over.

Q. When you say he got off the boat on the last trip over what do you mean?

A. He left the boat on the Rikers Island side.

Q. When was the last trip?

A. 8 o'clock.

Q. It started from New York at eight?

A. Right.

Q. When did he reach Rikers Island?

A. Between 8:11 and 8:15.

Q. How far was the boat landing from J. P. Carlin's office or the place of work where the men reported?

A. I should judge about five minutes' walk.

Q. So that by taking this last trip the earliest Mr. Miller could arrive at his place of work was 8:20?

A. Yes, sir.

Q. And that was five days per week?

A. Yes, sir.

Mr. O'Brion: Your father, George I. Forsythe was killed in this explosion, was he not?

Witness: Yes, sir.

[fol. 55] By Mr. Leichtman:

Q. Mr. Forsythe, you actually was not engaged on the boat in any capacity?

A. I was manager.

Q. But you were not actually engaged on the boat?

A. I was there every Saturday and Sunday and every night we had a moonlight excursion.

Q. You were there every Saturday and Sunday and every time you had a moonlight excursion?

A. Yes. During the week when my father wasn't there I was there usually.

Q. Only when your father was not there you usually ran up?

A. Yes.

Q. How long did you stay when you ran up?

A. If I went in the afternoon I stayed until the evening. If I went in the morning, depending on what I had to do in the office. If there was nothing to do I remained on the boat.

Q. As a general rule you were the office man, that's where you stayed?

A. No, I took care of repairs on the boat and purchases of every type. People who were interested in chart-ing the boat for an excursion, I would arrange to meet them there and show them around.

Q. That was the nature of your work, general business manager?

A. Yes, sir.

Q. Mr. Forsythe, were not there some times when the men had to quit earlier because of rain or some other condition where they couldn't work?

A. Yes.

Q. That boat was available to take them at these times?

A. The boat was laying on Rikers Island. As a matter of fact we didn't wait until we were called. If there were signs of rain we sent the boat over and let it lay on the Rikers Island side. The reason it laid on the New York [fol. 56] side during the day was because the dock over there was in use.

The Referee: Do I understand paragraph 14 and paragraph 37, on pages 14 and 16 respectively are to be received in evidence? They have not been marked in evidence.

Mr. Leichtman: Fourteen was read into the record.

The Referee: And that's in evidence?

Mr. Leichtman: Yes, sir.

Mr. O'Brion: I had an objection, if I recall now, to it as being incompetent, irrelevant and immaterial. I concede it was part of the contract. The other section your Honor referred to is what?

The Referee: Thirty-seven.

Mr. O'Brion: Under the paragraph "Employes"?

The Referee: Yes.

Mr. O'Brion: Yes. That was a general condition applying to all contracts. I concede that is, but under the same objections, as not competent and material and relevant, and I take exception.

The Referee: The case is now submitted, is it?

Mr. O'Brion: If the Court please, I would like to have on the record a motion to dismiss.

The Referee: Yes. I anticipate both of you gentlemen want to submit a brief? I will let you submit your motion to dismiss with your brief.

[fol. 57] By Mr. Leichtman:

Q. Mr. Forsythe, did you know Mr. Bell?
A. The superintendent, yes, sir.
Q. He was superintendent of P. J. Carlin on this job?
A. Yes.

Hearing before The Industrial Board, November 8, 1933.
Present—Nelle Swartz, Member of Board.

Appearances:

Wm. L. O'Brion, Esq., Representing Employer and Insurance Carrier.

Slavin & Leichtman, Attorneys for Claimant, Mr. Max Leichtman, of Counsel.

COLLOQUY

Miss Swartz: This is for review on request of claimant's attorney of the action disallowing the claim on the ground of no jurisdiction and no accident arising out of and in the course of employment.

Mr. Leichtman: May I ask whether the file shows the three exhibits I offered in evidence at that time?

Miss Swartz: To what do you refer?

Mr. Leichtman: One was a notice the employer was carrying compensation insurance, and the other two,——

Miss Swartz (Int'g): This is one of those cases he was injured when the "Observation" blew up in the East River. Is that right?

Mr. O'Brion: Yes.

Mr. Leichtman: Yes.

[fol. 58] Miss Swartz: Question of admiralty jurisdiction. Whether the accident arose out of and in the course of employment are the points at issue?

Mr. O'Brion: Yes.

Miss Swartz: Mr. Nye disallowed the claim?

Mr. O'Brion: Yes.

Mr. Leichtman: He disallowed the claim on the ground of no jurisdiction; did not arise out of and in the course of employment. I don't see the notice. There is evidence a notice was posted to show the employer carried compensation insurance, a notice similar to this. I want to talk on that point, particularly because I did not emphasize the wording of the notice in my brief.

Mr. O'Brion: I don't recall that there was such a notice in evidence.

Mr. Leichtman: The notice was not offered in evidence, but I think the Board will take notice the form of the notice was approved or must be approved by the State Department and must be on record, the form of notice used by various insurance companies in the year of the accident, which form is still the same form. The first point we made was there was contractual relationship here between the employer and employee. The Carlin Company, the carrier's attorney says was only one of five contractors. As a matter of fact the evidence shows Carlin was the contractor, and the other people worked on the island for the sub-contractor of Carlin. There were five contractors in all, but Carlin was the contractor.

Miss Swartz: There is no use arguing this case if all those things are in the record.

Mr. Leichtman: Everything is in the record with the exception of one thing, I would like you to take notice of it.

Miss Swartz: I can't if it is not in the record.

[fol. 59] Mr. Leichtman: You can in my opinion because the State Law has provided,—if you can't take notice of it

I would like to have time to get evidence to show the notice posted by the employer.

Miss Swartz: When you speak of the employer?

Mr. Leichtman: Carlin, given to the employer by the insurance company, had these words: "The undersigned employer hereby gives notice he has complied with the provisions of the Workmen's Compensation Law and the rules of the Industrial Board of the State of New York, has secured a policy of compensation for his employees and dependents of employees engaged in the hazardous employment enumerated in such law and has elected to bring within the provisions of such law all employees whether engaged in such hazardous employment or otherwise, including employees engaged in maritime employment." If you will not take judicial notice of the fact that was the notice posted by all insurance carriers or given by all insurance carriers to their assureds I would like to have time to get definite proof it is the exact wording of the notice.

Miss Swartz: Is the policy in evidence?

Mr. Leichtman: No, it was conceded Carlin had it. The point raised by the carrier is the accident having happened on a navigable stream, no jurisdiction; that it is maritime tort. The point we make is, having happened on a river entirely within the State of New York, is one which is a matter of local concern. The Supreme Court of the United States has held where the duties were of a bricklayer compensation shall be the exclusive remedy even though the accident happened on a navigable stream, compensation goes. The Compensation Law does not limit the general [fol. 60] rights of the maritime law. The point I want to make this morning is this, that the insurance carrier and all carriers have taken the position in their notice they cover maritime accidents. Now, they take the position when, what they call a maritime accident has happened, that the Compensation Board has no jurisdiction.

Mr. O'Brion: There is no notice; no policy put in evidence in the record.

Miss Swartz: As I understand it, you are not asserting you did not cover the men on the island, are you?

Mr. O'Brion: No.

Miss Swartz: I think it is irrelevant. They are not denying they covered the men once they were on the island. Your statement is this was posted on the island on a shanty?

Mr. Leichtman: Yes.

Miss Swartz: You don't deny you cover them?

Mr. O'Brion: No. We complied with the law as to notice, but the particular wording of the notice I have no knowledge of, and I can't concede.

Miss Swartz: Why wasn't the policy made part of the record?

Mr. O'Brion: It wasn't inquired about at all.

Miss Swartz: This case, you appreciate, has considerable significance. I understand there are quite a few cases of injury and death. It is a case which will be considered by the entire Board because of its significance. I am inclined to reserve decision on the record as it stands today and bring it up at the Board meeting to discuss the question with the Board. If for any reason they are of the opinion additional evidence should be introduced, either the evidence which you indicate or the policy, I will have to put it back on the calendar for that purpose, if that's agreeable.

Decision reserved.

[fol. 61] EXHIBIT 1 OF APRIL 27, 1933

Received in Evidence, Referee Nye

The P. J. Carlin Construction Co.

Builders and Engineers

Rikers Island

Foot of East 134th Street, New York

Notice Regarding the Use of Ferry "Observation"

The Attention of All Men Using the Ferry Is Directed to the Necessity of Maintaining Order and Avoiding Confusion Particularly at Docking Time. A Few Individuals, Who, By Jumping Rails, Crowding the Gang Planks, Horseplay, and Disorderly Conduct, Create Elements of Danger to Themselves and All Others.

For Your Own Good, You Are Warned That Sharp Action Will Be Taken With Offenders—You are Subject to Being Discharged and Also Prosecuted.

Give the Captain a Break—He Will Give You a Quick, Safe, and Pleasant Trip If You Do.

The P. J. Carlin Construction Company, Inc., J. K. Bell, General Superintendent.

[fol. 62] EXHIBIT 2 OF APRIL 27, 1933

Received in Evidence, Referee Nye

P. J. Carlin Construction Co.

Memorandum

June 22nd. 1932.

Notice

Starting tomorrow morning the Steamer "Observation" will make an additional trip to Rikers Island at 6:50 A. M. This will be in addition to the usual 7:30 A. M. trip.

The P. J. Carlin Const. Co., Inc., J. K. Bell, General Sup't.

EXHIBIT 1 OF MAY 5, 1933

Received in Evidence, Referee Nye

June 26th, 1931.

Captain Geo. I. Forsyth, 104 Bement Ave., West New Brighton, Staten Island, N. Y.

DEAR SIR:

Superseding all previous correspondence, licenses and agreements which are hereby revoked and cancelled, you are hereby licensed to operate a ferry service for the trans- [fol. 63] portation of the men engaged upon the construction of the Rikers Island Penitentiary Building, for which we are the general contractors, upon the following terms and conditions,

(1) You are to operate the Steamer "Observation", which is warranted by you to be officially rated at 250 capacity by local steamboat inspectors, Custom House, N. Y., full crewed, full covered with adequate public liability and workmens compensation insurance, upon a schedule furnished to you by our Field Office, and calling for operation five days in the week only, from Monday to Friday inclusive.

(2) You are to be compensated therefor by collecting fares from the men at the rate of 10¢ a round trip. In the event that your fares do not reach the sum of $60.00 upon any given day, we shall reimburse you for the difference. Where your fares exceed $60.00 a day, you will pay the excess to us up to a point where we are reimbursed for any monies paid to you by us under this license.

(3) It is understood that we are in no way obligated to continue your services, which may be suspended or completely shut down at any time at our pleasure. It is understood that you will procure all landing permits except at the Rikers Island landing. This boat will be held for this service for twelve hours a day, and in the event that it becomes disabled, another boat will be immediately substituted of equal capacity, namely, 250, under the Steamboat Inspector's rating.

[fol. 64] (4) We understand that your boat is warranted to be in first class condition, with all necessary permits to operate in this service.

(5) It is understood, furthermore, that you will furnish a Surety Co. bond, guaranteeing performance on your part. We desire that you furnish this bond at once.

Please acknowledge this letter with your assent to all of its terms. We also wish you to send us certificates of your public liability insurance and workmen's compensation policies.

Yours very truly, The P. J. Carlin Construction Co.
(Signed) J. F. Carlin, Secretary.

JFC:K

Agreement

Agreement, made this 20 day of July, 1932 by and between The P. J. Carlin Construction Company, of 405 Lexington Avenue, New York City, New York, hereinafter called the Contractor and Albee Godfrey-Whale Creek Company, Inc. of Stewart Avenue & Townsend St., Brooklyn, N. Y. hereinafter called the Subcontractor.

The parties hereto for the consideration hereinafter named, hereby mutually agree as follows:

1. The General Contract.—Whenever the word "contract" is used in this agreement, it shall mean the Contract [fol. 65] between the Contractor and The City of New York, dated the 29th day of December, 1930, for furnishing the labor and materials required for Contract No. 1—General Construction Work, Rikers Island Penitentiary, including the proposal for bids, the bid, the bond, the contract and the specifications thereto annexed, also the drawings of the work, and the detailed drawings pertaining thereto, and bulletins.

The Contract is hereby made a part of this agreement, and all of the requirements, covenants, stipulations and restrictions contained therein, which are applicable to the work of the Subcontractor, are hereby made a part hereof, except as the same are hereby expressly modified.

2. Investigation by Subcontractor.—The Subcontractor hereby expressly declares and acknowledges that, before the signing of this agreement, he carefully read the same and the whole thereof, together and in connection with the Contract, including the drawings and specifications, and that he thoroughly understands the intent thereof; that he examined the site of the work and satisfied himself by his own investigation and research as to all of the quantities and conditions, and he will make no claim or demand upon the Contractor or upon the City by reason of any misunderstanding of the Contract, or by reason of any estimate, test or representation by an officer or agent of the Contractor or of the City.

3. Work to be done.—The subcontractor will furnish all labor, materials, tools and appliances and perform all the work required by or in connection with the Contract, and included in the Contract.

[fol. 66] 19. Insurance.—The contractor will, during the progress of the work, maintain insurance on the same against loss or damage by fire, the policy or policies to cover all work and materials incorporated in any building, and to be made payable to the Contractor and the several Subcontractors as their respective interests may appear.

The Subcontractor will provide and maintain Workmen's Compensation Insurance and Public Liability Insurance, such Public Liability Insurance, to be in the amount of Twenty-five thousand dollars for injury to any one person,

and Fifty Thousand Dollars ($50,000.00) Dollars for injuries in one accident, and the Subcontractor will furnish to the Contractor upon request, certificates showing such insurance.

Agreement

Agreement, made this — day of —, 1931, by and between The P. J. Carlin Construction Company, of 405 Lexington Avenue, New York City, New York, hereinafter called the Contractor and Albee Godfrey-Whale Creek Co. Inc., Stewart Ave. and Townsend St., Brooklyn, N. Y. hereinafter called the Subcontractor.

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The Contract is hereby made a part of this agreement, and all of the requirements, covenants, stipulations and restrictions contained therein, which are applicable to the work of the Subcontractor, are hereby made a part hereof, except as the same are hereby expressly modified.

2. Investigation by Subcontractor.—The Subcontractor hereby expressly declares and acknowledges that, before the signing of this agreement, he carefully read the same and the whole thereof, together and in connection with the Contract, including the drawings and specifications, and that he thoroughly understands the intent thereof; that he examined the site of the work and satisfied himself by his own investigation and research as to all of the quantities and conditions, and he will make no claim or demand upon the Contractor or upon the City by reason of any misunderstanding of the Contract, or by reason of any estimate, test or representation by an officer or agent of the Contractor or of the City.

3. Work to be done.—The Subcontractor will furnish all labor, materials, tools and appliances and perform all the work required by or in connection with the Contract, and included in the Contract under the following items and descriptions:

All labor and materials necessary to furnish and erect, all miscellaneous and ornamental iron required by the [fol. 68] drawings and as described in the specifications, Page 1-115, Paragraphs 1 to 10, to Page 1-128, Paragraph 176 inclusive, but does not include flag staff, Paragraphs 72 and 73; vault doors, Paragraphs 110 and 111; Steel plate partitions, Paragraphs 113, 114 and 115; Wire mesh, Paragraphs 116 to 121 inclusive; Mono rail, track and hoist, Paragraphs 154 to 162 inclusive; Metal equipment, Mess Halls, Paragraphs 173 to 176 inclusive, or as modified in the bulletins.

19. Insurance.—The contractor will, during the progress of the work, maintain insurance on the same against loss or damage by fire, the policy or policies to cover all work and materials incorporated in any building, and to be made payable to the Contractor and the several Subcontractors as their respective interests may appear.

The Subcontractor will provide and maintain Workmen's Compensation Insurance and Public Liability Insurance, such Public Liability Insurance, to be in the amount of Twenty-five Thousand ($25,000.00) Dollars for injury to any one person, and Fifty Thousand ($50,000.00) Dollars for injuries in one accident, and the Subcontractor will furnish to the Contractor upon request, certificates showing such insurance.

The Subcontractor also agrees to bear the cost of fire insurance called for in Art. XLVII, Page C-20 of the Contract in such proportion as the value of the work performed by him in accordance with this agreement, bears to the total value of the work done on the Contract.

[fol. 69] Transportation

14. Each Contractor shall investigate the existing means of transportation to and from Rikers Island. The City shall not be held responsible for providing regular ferry service. The Contractor must assume responsibility for the transportation from Mainland to island of men and materials for all work done under this contract.

Dock

15. The General Contractor shall investigate the docking facilities on Rikers Island. He shall consult with the officials of the Department of Correction, and if the facilities are found inadequate for his use, he shall construct other dock or docks. Should this be required, it or they must be built in accordance with the rules and regulations of the Department of Docks of the City of New York, and the Department of Correction.

16. If the Contractor should decide first to construct the Coal Dock called for under the Contract for General Construction, he may have the use of the present dock for the handling of materials and may omit the construction of the temporary dock called for under the preceding paragraph, provided that he completes the Coal Dock before using the existing dock.

17. The General Contractor shall permit the other contractors to use the dock or docks without cost. Other contractors shall cooperate with the General Contractor and make proper arrangements for the use of dock.

[fol. 70] Results of Borings

18. The City shall not be held as being responsible for any misunderstanding as to the depth or character of the excavations to be made, or the nature or amount of the work to be done. Any diagram, chart, plan or description of borings which may be submitted with the drawings, shall not, because of the well-under*t*sood difficulties under which such borings are made be held to be final and conclusive.

Co-Operation

19. Inasmuch as the completion of the work within the prescribed limit of time is dependent very largely upon the close and active co-operation of all those engaged therein, it is therefore expressly understood and agreed that each Contractor shall lay out and install his work at such time or times and in such manner as not to delay or interfere with the carrying forward of the work of other Contractors and the completion of the work within the time set forth in the contract. It is further agreed that in the event of any dispute arising as to possible or alleged inter-

ference between the various Contractors which may have to do with the progress of the work, that the same shall be decided by the Architects, whose decision as to party or parties at fault and manner in which the matter may be adjusted shall be binding and conclusive on all parties.

Employees

37. Nothing contained herein shall in any way lessen the responsibility for the Contractor from securing as sub-con- [fol. 71] tractors, competent firms, concerns or individuals in the respective lines, and from their being required to comply with all plans, specifications, instructions of the Architects, and with all General and special Conditions or requirements of the contract, precisely the same as the Contractor himself.

In Supreme Court of New York, Appellate Division

Order of Affirmance—Jan. 21, 1935

The above named appellants having appealed from the award of the State Industrial Board for which findings were signed in the office of said Board on or about the 7th day of July, 1934, whereby an award of compensation was made in favor of the claimant herein, and said appeal having come on to be heard in this Court, and having been argued by Isaac Frank, Esq., Assistant Attorney General, [fol. 72] for the State Industrial Board, and by William B. Davis, Esq., for the appellants, and due deliberation having been had thereon;

Now, on motion of John J. Bennett, Jr., Attorney General, attorney for the State Industrial Board, it is

Ordered, that the award of the State Industrial Board so appealed from be and the same is hereby unanimously affirmed with $79.55 costs to be paid by the appellants to the State Industrial Board.

(Signed) John S. Herrick, Clerk.

Ent. 1/21/35.

BEFORE INDUSTRIAL BOARD OF STATE OF NEW YORK

ORDER MAKING ORDER OF APPELLATE DIVISION THE ORDER OF STATE INDUSTRIAL BOARD

The above named P. J. Carlin Const. Co., employer and Travelers Insurance Co., insurance carrier, having appealed to the Appellate Division of the Supreme Court in and for the Third Judicial Department, from the award and decision of the Industrial Board of the State of New York, for which findings were signed in the office of said Board on or about the 7th day of July, 1934, whereby compensation was awarded the above named Edward Heaney, and said appeal having been duly heard by said Court, and the said Appellate Division of the Supreme Court, having at a term thereof commencing on the 7th day of January, 1935, unanimously affirmed the award or decision hereto- [fol. 73] fore made by the Industrial Board of the State of New York, and the order of the said Appellate Division having been entered in the office of the Clerk of said Court on 21st day of January, 1935, and the papers on appeal herein together with a certified copy of said order of the Appellate Division having been duly filed, wherein said award of said Industrial Board of the State of New York was unanimously affirmed by the Appellate Division in the following terms:

Ordered, that the award of the State Industrial Board so appealed from be and the same is hereby unanimously affirmed with $79.55 costs to be paid by the appellants to the State Industrial Board.

It is ordered that the order of the Appellate Division in the above entitled matter be and the same hereby is made the order of the State Industrial Board therein, with interest from date of said award.

Dated New York, February 14, 1935.

Maud Swartz, Secretary. (Seal.)

IN COURT OF APPEALS OF NEW YORK

ORDER GRANTING LEAVE TO APPEAL TO THE COURT OF APPEALS

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the

[fol. 74] part of the appellants herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is granted.

A copy.

John Ludden, Deputy Clerk. (Seal.)

State of New York, Court of Appeals.

In Court of Appeals of New York

Notice of Appeal to Court of Appeals

Sirs:

Please take notice that pursuant to an order of the Court of Appeals of the State of New York, entered at a term thereof commencing on the 15th day of April, 1935, granting leave to the appellants to appeal to the said Court of Appeals, P. J. Carlin Construction Co., and The Travelers Insurance Company, hereby appeal to the Court of Appeals of the State of New York, from the unanimous order of affirmance made and entered in the office of the Clerk of the Appellate Division, Third Department, on the 21st day of January, 1935, and from the order and award of the State Industrial Board based upon the said order of affirmance and entered in the office of the State Industrial [fol. 75] Board on or about the 14th day of February, 1935.

This appeal is from the whole of said order, and of said award, and each and every part thereof.

Dated New York, May 8, 1935.

Yours, etc., E. C. Sherwood, Attorney for Appellants, Office & P. O. Address, 100 East 42nd Street, Borough of Manhattan, City of New York.

To John J. Bennett, Jr., Attorney General, The Capitol, Albany, New York. Joseph A. McLaughlin, Assistant Attorney General, 80 Centre Street, New York City. Slavin & Leichtman, 11 West 42nd Street, New York City.

[fol. 76] Clerk's certificate to transcript omitted in printing.

[fol. 77] Certificates of reporter and chief judge to opinion of Court of Appeals omitted in printing.

[fol. 78] IN COURT OF APPEALS OF NEW YORK

In the Matter of the Claim of EDWARD HEANEY, for Compensation Under the Workmen's Compensation Law, Respondent,

v.

P. J. CARLIN CONSTRUCTION COMPANY et al., Appellants; STATE INDUSTRIAL BOARD, Respondent

(Decided November 19, 1935)

Appeal by the employer and the insurance carrier from an order of the Appellate Division, third department, which affirmed an award of the Industrial Board.

Permission to appeal was granted by the Court of Appeals.

E. C. Sherwood and William B. Davis for appellants.

John J. Bennett, Jr., Attorney-General (Henry Epstein and Roy Wiedersum, of counsel), for respondents.

OPINION

HUBBS, J.:

Claimant was injured by an explosion on a boat on which he was going to work. It is urged an award of compensation cannot be sustained because the maritime law applies.

In considering this case it is necessary to determine, first, whether it involves a contract matter or a tort matter and, secondly, if a contract matter, whether the contract was maritime in its nature. This is true because of the well-established rule enunciated by the Supreme Court of the United States.

"The general doctrine that in contract matters admiralty jurisdiction depends upon the nature of the transaction and in tort matters upon the locality, has been so frequently asserted by this court that it must now be treated as settled." (Grant Smith-Porter Ship Co. v. Rohde, 257 U. S. 469, 476.)

If a tort matter be involved in this proceeding then since the accident occurred upon navigable waters, it would seem that admiralty would have jurisdiction. If it were a proceeding instituted against the shipowner for damages resulting from the explosion of the ship, without doubt a tort matter would be involved. It is not, however, such a proceeding. It is against the employer and is not instituted on the theory that a tort has been committed. As was said in State Industrial Commission v. Nordenholt Corp. (259 U. S. 263, 271), "an award under the Workmen's Compensation Law is not made on the theory that a tort has been committed; on the contrary, it is upon the theory that the statute giving the commission power to make an award is read into and becomes a part of the contract. • • • The contract of employment, by virtue of the statute, contains an implied provision that the employer, if the employee be injured, will pay to him a certain sum to com- [fol. 79] pensate for the injuries sustained, or if death results, a certain sum to dependents. These payments are made irrespective of whether or not the employer was guilty of wrong doing. It is a part of the compensation agreed to be paid for services rendered in the course of the employment." (Cf. Matter of Post v. Burger & Gohlke, 216 N. Y. 544; Matter of Doey v. Howland Co., 224 N. Y. 30.)

No recovery is sought against the employer in this case because of any wrong alleged to have been done by the employer. A recovery is sought as the result of injuries for which the statute, read into the contract, gives a right to recovery.

If the question of tort be not involved, then we are confronted with the question as to whether the contract of employment is maritime in its nature. The contract of employment was for the services of the claimant in the erection of a building. It was not a contract to do work upon a vessel in navigable waters nor even to do work remotely connected with any undertaking having to do with navigation or commerce. The presence of the claimant upon the boat was a mere incident of the contract of employment, it having been found as a fact that he was on the boat as an employee of the contractor against whom the award has been made.

Even though the part of the contract of employment which brought about his presence on the boat be deemed to make the contract of employment martime in its nature, the subject remains local in character and the applicability of the State compensation law quite possibly might be upheld in a Federal court under the exception to the general rule as to the applicability of maritime law which permits the application of a State statute where so doing will not "work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations." (259 U. S. 263, 274.)

The discussion of the general rules and exceptions thereto in State Industrial Commission v. Nordenholt Corp (supra) is most illuminating and it seems to clearly point the way to the proper disposition of this case. The claimant was not a maritime worker. He was not engaged at the time he was injured directly or indirectly in any work having to do with commerce or navigation. While he was injured on a ship in navigable waters, he was not a passenger in the general sense of the word and this proceeding is not instituted on the theory of any contract for carriage between himself and the owner of the ship. Though he paid his fare it may be assumed that his compensation for the work in which he was engaged was so adjusted as indirectly [fol. 80] to reimburse him for that expenditure. The contract of carriage was not made primarily for his benefit but under a requirement of the main contract of his employer for the transportation of his employees. By upholding the applicability of the Workmen's Compensation Law (Cons. Laws, ch. 67) under the facts in this case, no material prejudice can result to the characteristic features of the general maritime law. No effect will be had upon the established rules as to the applicability of maritime jurisdiction to questions arising between passengers and shipowners or maritime workers and the owners of ships or other employers engaged in maritime work. The matter is as much one of local concern as if the employee had been injured while at work on the building on the island. To permit claimant to succeed, it is not necessary to find any wrong-doing on the part of his employer, so that the question of the proper or improper operation of the ship is not

involved. It is not necessary to rely upon any provision of the contract of carriage.

In La Casse v. Engineering Works (242 Mich. 454) the court said:

"3. If an injury occurs on navigable waters and *in the performance of a maritime contract, it is certainly* within the exclusive jurisdiction of admiralty unless

"(a) the contract is of merely local concern, and

"(b) its performance has no direct effect upon navigation or commerce, and

"(c) the application of the state law 'would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations.'

"4. State workmen's compensation laws, contractual in character, are applicable to maritime service on navigable waters when, and only when, the service is within the exceptions (a), (b) and (c) above.

"5. If, however, the injury occurs on navigable waters, but *in the performance* of a non-maritime contract, it is, at least *prima facie* local and within the operation of state laws. If there are any exceptions to this rule, they are yet to be developed."

This court, in Matter of Doey v. Howland Co. (supra, p. 35), a proceeding under the Workmen's Compensation Law, where an employee of a company was killed while making repairs to a ship of which it was not the owner, said: "Was Doey, at the time of his death, engaged in the performance of a maritime contract * * *. In determining whether a contract be of a maritime nature, locality [fol. 81] is not controlling, since the true test is the subject-matter of the contract—the nature and character of the work to be done."

While the injury to the claimant Heaney occurred on navigable water, he was not at the time engaged in the performance of a maritime contract. He was engaged in the performance of a contract non-maritime in its nature and the recovery sought is "a part of the compensation agreed to be paid for the services rendered in the course of the employment."

If the action were for wages due under the contract of employment, the Federal court would not have jurisdiction. Jurisdiction is not conferred upon that court because another part of the agreed compensation is sought to be recovered or because there chances to be an independent contract for passage with a third party or a tort liability on the part of the third party.

With this view of the applicable rule we may consider the cases which might appear to establish a contrary rule.

The first of these is Spencer Kellogg & Sons, Inc., v. Hicks (285 U. S. 502, 512, 514). The workmen, employees of Kellogg & Sons, in the manufacture of linseed oil at Edgewater, New Jersey, lived in New York. In order to ferry them to and from the factory, the company owned and operated the Linseed King, a gasoline launch. Those killed and injured were of three classes, regular employees of Kellogg & Son in the Edgewater plant, men who had applied for work in discharging the cargo of a ship the preceding day but who had been advised to report again on the morning of the accident, and men seeking employment in answer to an advertisement. The court there held the compensation statute of the State of New Jersey inapplicable on the ground that it was incapable of enforcement by the ordinary process of any court and "is not saved to suitors from the grant of exclusive jurisdiction to the Courts of the United States of all civil cases of admiralty and maritime jurisdiction." The court said: "Kellogg & Sons undertook the interstate carriage of passengers by water on a launch operated by its servants. This was a maritime matter. The ferriage was for the facilitation of the company's business and for its convenience as well as that of the employees. The injury to the passengers resulted from negligence of the company's agent in the navigation of the launch. It was a maritime tort. The rights and obligations of the parties depended on and arose out of the maritime law. A proceeding to impose liability for such a tort is a cause in admiralty * * *."

The court further said: "Kellogg & Sons sustained toward employees injured or killed the dual relationship of a carrier by water and a general employer at its Edgewater plant."

[fol. 82] In that case the employer was the owner of the boat, undertook the interstate carriage of passengers by

water on a launch operated by its servants, sustained a dual relationship to its employees of a carrier by water and a general employer, and was guilty of a maritime tort. None of these things are present in the instant case. Here, since the employer was not a carrier of passengers by water, it was not guilty of a maritime tort and the proceeding is not one to "impose liability for such a tort" as the proceeding in the Kellogg case was held to be.

In Knickerbocker Ice Co. v. Stewart (253 U. S. 149) the employee for whose death compensation was asked was employed as a barge man and was doing work of a maritime nature. There the very fact that the employee was employed as a barge man and that it was found that he was doing work of a maritime nature distinguishes that case from the one at bar.

In Southern Pacific Co. v. Jensen (244 U. S. 205) the deceased employee was engaged in driving a small electric freight truck into the steamship El Oriente where it was loaded with cargo, then driving the truck out of the vessel upon a gangway, connecting the vessel with pier 49, North river, and thence upon the pier where the lumber was unloaded from the truck. He jammed his head between the lumber and the ship, thereby breaking his neck. Compensation was awarded under the New York State statute. The court said that the work of a stevedore in which the deceased was engaged was maritime in its nature, his employment was a maritime contract and that the injuries which he received were likewise maritime. This statement of the holding of the court makes it evident that the employee there was engaged in maritime work and that the case is not authority for holding claimant in this case not entitled to compensation.

The fact that by section 29 of the Workmen's Compensation Law the claim of an employee against a third party for tort is assigned to the carrier paying an award or the further fact that the same statute provides for assignment of a cause of action based upon a payment into the State fund in a case where a person is killed through negligence does not bar this proceeding. The right to compensation is not dependent upon the existence of a claim or cause of action against a third party. No liability on the part of the third party is created by the statute. The effect of the statute is not to guarantee collection of damages as a result

of the assignment. The assigned cause may be valueless as a result of contributory negligence on the part of the injured employee (Liberty Mutual Ins. Co. v. Colon & Co., 260 N. Y. [fol. 83] 305), inability of the assignee to establish negligence on the part of the third person (Liberty Mutual Ins. Co. v. Colon & Co., supra), financial irresponsibility of the third person, or that conduct tortuous under the law of the forum where the compensation contract is enforceable is not tortuous under the law of the forum where the accident occurred. (Travelers Ins. Co. v. Central R. R. Co. of N. J., 143 Misc. Rep. 589.)

Why should it be held that the contract right is rendered unenforceable as between the parties thereto for the reason that there exists incapacity on the part of the assignee of the cause of action, based upon the possible tort liability of a third person to maintain an action thereon? To do so would defeat the main purpose of the compensation contract of which the provision for assignment is a mere incident. Regardless of the enforceability of the assigned cause, the employee parts with a valuable right. That it may prove of no value in the hands of the assignee is a matter over which the injured employee has no control.

The order should be affirmed, with costs.

A question under the Federal Constitution was presented and necessarily passed upon by this court. It relates to the exclusive jurisdiction of the Federal courts over admiralty cases. The claimant was injured by the explosion of a passenger steamer on the East River, New York. This court held that the Workmen's Compensation Law of the State applied, and that the Federal courts had not exclusive jurisdiction to afford relief.

Dissenting Opinion

Crane, Ch. J. (dissenting):

In September of 1932 the P. J. Carlin Construction Company, of 405 Madison avenue, New York city, had a contract with the city of New York for the construction work on Riker's Island, State of New York. The island is owned by the city of New York and used for a penal institution—a penitentiary—and the building operations consisted of the erecting and equipping another penitentiary building and a power house. The island was a mile or two from the

shore, the municipality running a ferry which was used almost entirely for transporting prisoners. It was necessary for the Carlin Company to provide transportation facilities for its workmen, as its contract contained this provision: "Each Contractor shall investigate the existing means of transportation to and from Rikers Island. The City shall not be held responsible for providing regular ferry service. The Contractor must assume responsibility for the transportation from Mainland to island of men and materials for all work done under this contract."

[fol. 84] The Carlin Company made arrangements with one George I. Forsythe, the owner of a steamboat, for this transportation. The steamer was called the Observation and was capable of carrying two hundred and fifty passengers. It was not used exclusively for Carlin's men. Carlin's arrangement with Forsythe was embodied in a letter, June 26, 1931, and orally accepted by Captain Forsythe. In part it reads as follows: "You are to operate the Steamer 'Observation,' which is warranted by you to be officially rated at 250 capacity by local steamboat inspectors, Custom House, N. Y., full crewed, full covered with adequate public liability and workmen's compensation insurance, upon a schedule furnished to you by our Field Office, and calling for operation five days in the week only, from Monday to Friday inclusive.

"You are to be compensated therefor by collecting fares from the men at the rate of 10c a round trip. In the event that your fares do not reach the sum of $60.00 upon any given day, we shall reimburse you for the difference. * * *

"We understand that your boat is warranted to be in first class condition, with all necessary permits to operate in this service."

The claimant Edward Heaney, who resided in the city of New York, was one of Carlin's workmen, and on the 9th day of September, 1932, boarded the steamboat Observation at One Hundred and Thirty-sixth street for the purpose of going to work on Riker's Island. While the steamboat was in operation and en route to the island, there was a terrific explosion—it was blown to bits, many passengers losing their lives, and this claimant, with others, being injured.

An award has been made to Heaney under the Workmen's Compensation Law of this State which has been unanimously affirmed by the Appellate Division, an appeal being

allowed by this court. The Commission made this finding: "At the time Edward Heaney sustained the accidental injuries herein above referred to, the status of the claimant and the employer herein was a matter of local concern, was subject to the regulation of the State and in no way worked prejudice to any characteristic feature of the General Maritime Law." Although this is stated as a finding of fact it is a conclusion of law drawn from the facts, with which we cannot agree.

That the explosion of a passenger steamer while in operation upon the seas, or, to be more exact, the East river as it opens into Long Island sound, was a maritime matter or maritime tort is self evident. That Heaney would have an action in admiralty against the steamer for any negligence [fol. 85] causing the explosion or for any unseaworthiness must be admitted. Such action would also lie in admiralty or at common law against the owner. Although most of the cases in the books deal with sailors or workmen on ships, maritime law applies as well to passengers. (Benedict on Admiralty [5th ed.], pp. 99, 100; The Moses Taylor, 71 U. S. [4 Wall.] 411; Chicago D. & G. B. Transit Co. v. Moore, 259 Fed. Rep. 490; certiorari denied, 251 U. S. 553.) To determine, therefore, whether the explosion of a passenger steamer at sea is a matter of local concern so that the application of our Workmen's Compensation Law will not prejudice the characteristic features of the maritime law or its uniformity of application, we must start with this conceded fact: that Heaney was injured in a maritime tort and, if there be negligence, has a cause of action against the ship or the owner in admiralty. In other words, if there be any wrong or any cause of action, admiralty has jurisdiction of it, preserving to the States any common law remedy, which of course does not include the Workmen's Compensation Law. (Southern Pacific Co. v. Jensen, 244 U. S. 205; Knickerbocker Ice Co. v. Stewart, 253 U. S. 149.)

What is the effect of our Workmen's Compensation Law upon the remedy in admiralty? By section 29 of our Workmen's Compensation Law when the employee accepts compensation his cause of action is assigned to the insurance carrier. This is a modification of all rights existing at common law. No tort action could be assigned. But we go further, for the cause of action which passes to the insurance company is prosecuted not on the basis of subrogation

solely, but for the benefit of the insurance carrier. (Tracy v. American Mutual Liability Ins. Co., 266 N. Y. 536, decided January 24, 1935; cf. Zurich G. A. & L. Ins. Co. v. Childs Co., 253 N. Y. 324, 329; Travelers Ins. Co. v. Brass Goods Mfg. Co., 239 N. Y. 273.)

A new cause of action is also created by the New York statute which never before existed either at common law or in admiralty. By section 15 it is provided that the insurance carrier shall pay the sum of one thousand dollars into certain special funds in every case in which the person killed through negligence shall have left no person entitled to compensation. For this amount thus paid the insurance carrier is given a cause of action against the negligent third party. We held in Phanix Ind. Co. v. Staten Island R. T. Ry. Co. (251 N. Y. 127) that the same result followed when the widow or next of kin settled with the third party for more than would have been paid under the Workmen's [fol. 86] Compensation Law. In such a case the insurance carrier may recover from the third party an additional one thousand dollars which he has been obliged to pay into the State treasury.

Admiralty recognizes no such causes of action. They are peculiar to New York State and may vary with the enactments of every State Legislature. True, these provisions are not applicable here for the reason that Heaney is alive, not dead, but we are dealing with the application or the possible application of the Workmen's Compensation Law to an admiralty tort wherein a passenger on a steamer has been injured or killed. The very nature of the remedy provided by this State legislation shows on its face that it seeks to supplement or add to the admiralty law when a cause of action assigned to an insurance carrier is attempted to be prosecuted in admiralty. In Travelers' Ins. Co. v. Prince Line, Ltd. (262 Fed. Rep. 841), a District Court decision, Mayer, J., held that admiralty would not recognize the assignability of a tort action, and that our Workmen's Compensation Law did not apply to admiralty torts. In Knickerbocker Ice Co. v. Stewart (253 U. S. 149) it was held that the provisions of section 9 of the Judiciary Act of 1789 granting to the United States District Courts exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy, referred to remedies for the en-

forcement of the Federal maritime law. It conferred no substantive rights and did not authorize the States so to do. Our Workmen's Compensation Law does confer substantive rights. It gives to the insurance carrier a right to recover full damages when it has only paid out part, and also to recover on an entirely new cause of action for moneys contributed to State funds.

Whether Heaney has a cause of action for negligence in admiralty is beside the point. This all depends upon evidence as to the nature of the explosion. The fact remains that the explosion on this ship at sea was a matter of maritime jurisdiction, the common law remedies being preserved. Heaney has no claim, therefore, under the Workmen's Compensation Law of the State.

The United States Supreme Court, in Spencer Kellogg & Sons, Inc. v. Hicks (285 U. S. 502), had a case similar in facts and in my judgment exactly the same in principle. In that case the employer chartered the ship and it was held that his workmen, while being transported on navigable waters, should receive an award in admiralty but no award under the State compensation law. Like Heaney here, these employees were passengers. The fact that the employer in that case was the charterer or owner of the boat, [fol. 87] became important and was emphasized by reason of an application made by it to limit liability to the value of the boat as permitted under Federal statute. It had nothing to do with shifting or changing the principle that passengers being transported at sea or on navigable waters by a steamer are subject to admiralty jurisdiction. The court said: "Kellogg & Sons undertook the interstate carriage of passengers by water on a launch operated by its servants. This was a maritime matter. The ferriage was for the facilitation of the company's business and for its convenience as well as that of the employees. The injury to the passengers resulted from negligence of the company's agents in the navigation of the launch. It was a maritime tort. The rights and obligations of the parties depended on and arose out of the maritime law. A proceeding to impose liability for such a tort is a cause in admiralty within the meaning of Article III, Sec. 2 of the Constitution, triable in the United States courts sitting in admiralty" (p. 512).

If the rights and obligations of Heaney and Forsythe, the owner of the Observation which blew up, depend upon

and arise out of the maritime law, what becomes of those provisions of our State law which assign Heaney's cause of action to an insurance carrier and may in a proper case give the insurance carrier a claim against Forsythe for a thousand dollars contribution to a State fund? Heaney's remedy is solely in admiralty or at common law as our Workmen's Compensation Law does not apply to this unfortunate occurrence.

The authorities relied upon by the respondents, such as Millers' Ind. Underwriters v. Braud (270 U. S. 59); Sultan Ry. & T. Co. v. Dept. of Labor & Industries (277 U. S. 135), and State Industrial Board v. Terry & Tench Co., Inc. (273 U. S. 639 [240 N. Y. 292]), are not applicable as the work out of which the injury grew in those cases was so closely identified with the land that it had very little to do with transportation on navigable waters or with the safety or operation of ships. Admiralty, on the other hand, has always been solicitous of the seaworthiness and proper equipment of passenger craft both in behalf of passenger and seaman.

Since writing the above there has come to my attention the case of Kenward v. The "Admiral Peoples," (296 U. S. ——), decided June 3, 1935, by the United States Supreme Court, in which the Chief Justice wrote the opinion. A passenger on a steamboat while disembarking at Portland was injured by falling from a gangplank leading from the [fol. 88] vessel to the dock. The vessel was liable, and the question of jurisdiction arose. The Chief Justice said: "This is one of the border cases involving the close distinctions which from time to time are necessary in applying the principles governing the admiralty jurisdiction. That jurisdiction in cases of tort depends upon the locality of the injury. It does not extend to injuries caused by a vessel to persons or property on the land. Where the cause of action arises upon the land, the state law is applicable" (citing cases).

"The basic fact in the instant case is that the gangplank was a part of the vessel. It was a part of the vessel's equipment which was placed in position to enable its passengers to reach the shore."

The order of the Appellate Division and that of the Industrial Board should be reversed and the claim dismissed, with costs in all courts.

Crough, Loughran and Finch, JJ., concur with Hubbs, J.; Crane, Ch. J., dissents in opinion in which O'Brien, J., concurs, and Lehman, J., dissents also.

Order affirmed.

[fol. 89] Clerk's certificate to transcript omitted in printing.

[fol. 90] Citation, in usual form, omitted in printing.

[fol. 91] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL

To the Chief Judge of the Court of Appeals of the State of New York:

Your petitioners, The Travelers Insurance Company, and P. J. Carlin Construction Co., respectfully show:

Your petitioners are the appellants in the above entitled cause.

On September 9, 1932, the appellee Edward Heaney, sustained personal injuries by reason of an explosion which caused the sinking of the steamboat "Observation", on which the said appellee Heaney was a passenger, while the said boat was afloat and under propulsion in navigable waters in New York Harbor.

Thereafter, and on or about the 9th day of October, 1932, the appellee Edward Heaney, presented to and filed with the State Industrial Board of the State of New York his claim for compensation under the Workmen's Compensa-
[fol. 92] tion Law of the State of New York, alleging that your petitioner, the P. J. Carlin Construction Co., was his employer at the time of the said accident. At the time of the alleged accident, your petitioner, The Travelers Insurance Company, was the insurance carrier for the said P. J. Carlin Construction Co., and, as such, insured the payment of compensation to its employees under the provisions of the Workmen's Compensation Law of the State of New York.

Hearings on the aforesaid claim for compensation were held and testimony taken before a referee of the Industrial Board of the State of New York, and your petitioners there and then contended that the Industrial Board, and the Department of Labor, of which the Industrial Board is a part, were without jurisdiction because the accident occurred on navigable waters of the United States and the claim was, therefore, subject only to the admiralty jurisdiction of the United States.

The referee disallowed the claim upon the ground that the Board had no jurisdiction and on the further ground that the accident did not arise out of and in the course of the said claimant's employment. Upon appeal to the Industrial Board, a member of that Board reversed the decision of the referee, and awarded compensation to the said claimant, and thereafter the Industrial Board made findings in which it was stated that on September 9, 1932, while the said claimant was an employee of P. J. Carlin Construction Company and while he was engaged in the regular course of his employment and while working for his employer, and after boarding the steamboat "Observa-[fol. 93] tion" and while he was standing on the deck of the boat, which boat was in operation and en route to Rikers Island, the boat exploded, causing injury to said claimant. The findings also stated as facts that the said claimant stepped into his employment the moment he stepped aboard the said steamboat, that transportation on that boat was included within and was part of the contract of employment between P. J. Carlin Construction Co., and the said claimant, and was an incident of his employment, and that at the time the claimant sustained his injuries his status and that of the employer were a matter of local concern, subject to the regulation of the state, and in no way worked prejudice to any characteristic feature of the general maritime law. The findings also state specifically that the claim of this claimant is within the jurisdiction of the Industrial Board and not such a matter as is subject to the exclusive jurisdiction of the admiralty law.

An award of compensation under the said Workmen's Compensation Law was made to the said claimant and against both of the petitioners on the 8th day of December, 1933, and on the 26th day of December, 1933, your petitioners appealed from that award to the Appellate Division of the Supreme Court of the State of New York,

Third Department, which court, by a judgment entered on January 21, 1935, unanimously affirmed the said award.

Thereafter, upon application duly made, the Court of Appeals of the State of New York granted leave to appeal to the said court from the said unanimous judgment of affirmance of the Appellate Division, Third Department; and, after argument duly had, the Court of Appeals of the State of New York, on the 19th day of November, 1935, affirmed the said judgment of the said Appellate Division of the Supreme Court, and a judgment of affirmance thereof [fol. 94] was thereupon entered, and by the said judgment of affirmance the record was remitted into the said Appellate Division of the Supreme Court, Third Department, where the said record now remains.

That there is error in the said final judgment and the record of proceedings in the said Court of Appeals of the State of New York, whereby your petitioners are aggrieved. That in this case your petitioners have drawn in question the validity of a statute of the State of New York, namely, the Workmen's Compensation Law of the State of New York, under which the said award and said judgment were made, on the ground that said statute is repugnant to and in contravention of article III, section 2, of the Constitution of the United States, and of the Judicial Code, Section 24, clause 3, and section 256; U. S. C., title 28, sections 41 and 371. And the decision and judgment of the said Court of Appeals is in favor of the validity of the said Workmen's Compensation Law of the State of New York.

The Court of Appeals of the State of New York is the highest court in the said state in which a decision in this cause can be had and its said judgment of affirmance is final.

The Court of Appeals in its decision and in its judgment herein certified as follows:

"A question under the Federal Constitution was presented and necessarily passed upon by this court. It relates to the exclusive jurisdiction of the Federal courts over admiralty cases. The claimant was injured by the explosion of a passenger steamer on the East river, New York. This court held that the Workmen's Compensation Law of the state applied, and that the Federal courts had not exclusive jurisdiction to afford relief."

In accordance with section 237 (a) of the Judicial Code, [fol. 95] U. S. C., title 28, section 344, and in accordance

with the Rules of the Supreme Court of the United States, your petitioners respectfully show that the case is one in which, under the legislation in force when the Act of Congress of January 31, 1928, was enacted, to wit, under section 237 (a) of the Judicial Code, a review could be had in the Supreme Court of the United States on a writ of error, as a matter of right.

The errors upon which your petitioners claim to be entitled to an appeal are more fully set out in the assignment of errors, filed herewith, pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States; and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore, your petitioners pray for the allowance of an appeal from the said Court of Appeals of the State of New York, the highest court in said state in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and final judgment of the said Court of Appeals of the State of New York may be examined and reversed, and also pray that a transcript of the material parts of the record herein and the proceedings and papers in this cause, including the opinions delivered in the case, be made by the clerk of the Appellate Division of the Supreme Court, Third Department, under his hand and the seal of the said court and transmitted to the Supreme Court of the United States, as provided by law; and that an order be made fixing the [fol. 96] security to be required of your petitioners, and that the supersedeas bond tendered by your petitioners be approved, and that the said appeal may operate as a supersedeas.

Assignment of Errors

The said appellants assign the following errors in the record and judgment of the said Court of Appeals of the State of New York, to wit, that the said Court of Appeals of the State of New York erred in the said decision and judgment as follows:

1. In ruling that the subject matter of this case is of local concern and subject to the regulation of the State of New York.

2. In ruling that this case involves a contract matter and that said contract matter is of a non-maritime nature.

3. In ruling that the Workmen's Compensation Law of the State of New York is a valid law, applicable to this case.

4. In failing and refusing to rule that the subject matter of this case is a maritime matter, governed by the principles of the maritime law of the United States.

5. In failing and refusing to rule that courts administering the maritime law of the United States have exclusive jurisdiction to determine the rights and the liabilities of appellee Heaney and the appellants in respect of the subject matter of this case.

6. In failing and refusing to rule that the Workmen's Compensation Law of the State of New York is contrary to Article III, section 2, of the Constitution of the United States and to sections 24 and 256 of the Judicial Code, U. S. C., title 28, sections 41 and 371, in that it assumes to confer upon the appellee State Industrial Board of the State of New York jurisdiction to hear and determine a claim for statutory workmen's compensation in a matter of admiralty and maritime jurisdiction.

7. In giving judgment herein against the appellants and in favor of the appellee Heaney, affirming the award herein [fol. 97] of the appellee State Industrial Board of the State of New York and the judgment herein of the Appellate Division of the Supreme Court of New York, Third Judicial Department, affirming said award.

8. In failing and refusing to give judgment herein in favor of the appellants, on the ground that the said Workmen's Compensation Law of the State of New York is unconstitutional and void in that said statute, in so far as it purports to fix, determine and regulate the rights of the appellee Heaney against the appellants and the liabilities of the appellants to said appellee Heaney is repugnant to and prohibited by Article III, section 2, of the Constitution of the United States and sections 24 and 256 of the Judicial Code, U. S. C., title 28, sections 41 and 371.

PRAYER FOR REVERSAL

For which errors the appellants, P. J. Carlin Construction Co., and The Travelers Insurance Company, pray that the said judgment of the Court of Appeals of the State of New York, dated November 19, 1935, in the above entitled cause, be reviewed by the Supreme Court of the United States, and reversed, and a judgment rendered in favor of the appellants, and for costs.

Elmer Clyde Sherwood, Counsel for Appellants.

[fol. 98] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

On reading and filing the petition of P. J. Carlin Construction Co. and The Travelers Insurance Company, corporations, the appellants herein, praying for the issuance of an order herein allowing their appeal to the Supreme Court of the United States from the Court of Appeals of the State of New York, and it appearing from the said petition and the record of the above entitled cause, that there was drawn in question the validity of the award of the State Industrial Board of the State of New York on the ground that the said award and the statute of the State of New York on which the award is based are repugnant to the Constitution of the United States, and that the decision of the said Court of Appeals was in favor of the validity of such award and statute, and that such petition is a proper petition for the issuance of this order,

Now, therefore, it is ordered by the undersigned, the Chief Judge of the Court of Appeals of the State of New York, that said appeal be and same is hereby allowed; and

The said appellants, P. J. Carlin Construction Co., and The Travelers Insurance Company, now presenting a bond [fol. 99] in the sum of one thousand dollars, executed by said P. J. Carlin Construction Co. and The Travelers Insurance Company, as principals, and American Surety Company of New York, as surety, it is ordered that such

bond be and the same is hereby approved and received as the proper security on this appeal, and filed in the office of the Clerk of the Appellate Division of the Supreme Court, Third Department.

It is further ordered that the appeal herein shall operate as a supersedeas.

It is further ordered that the Clerk of the Appellate Division of the Supreme Court, Third Department, within forty days from this date, make and transmit to the Clerk of the Supreme Court of the United States under his hand and the seal of said court, a transcript containing a true copy of all material parts of the record herein which shall be designated by præcipe filed with him by any of the parties hereto.

Dated this 15 day of February, 1936.

Frederick E. Crane, Chief Judge of the Court of Appeals of the State of New York.

[fol. 100] IN SUPREME COURT OF THE UNITED STATES

Statements of Points to be Relied upon and Designation as to Printing Record—Filed March 11, 1936

APPELLANTS' POINTS

I

The entire subject of legal liability arising out of bodily injury suffered by a passenger in a shipwreck occurring in transportation over navigable waters of the United States is a maritime matter falling within the exclusive jurisdiction of the United States, by virtue of the provisions of Article III, Section 2, and of Article I, Section 8, of the Constitution of the United States.

II

Heaney's injury was maritime. It bears the closest relation possible to navigation and commerce, since it not only occurred in the actual course of navigation but arose directly out of the very fact and act of navigation.

III

It is not essential to the application of the maritime law that the matter involved relate to interstate or foreign

commerce. Federal jurisdiction over the latter is conferred by a separate, distinct and independent grant in the Constitution.

[fol. 101] IV

The absence of any wrongful act or neglect on the part of the appellant Carlin Company which would make it liable to Heaney under any known principle of the maritime law does not deprive the admiralty courts of their jurisdiction.

V

The subject matter of this case is not of purely local concern nor is it within the jurisdiction of the State of New York.

VI

This proceeding to recover compensation under the provisions of the New York Workmen's Compensation Law is not a common law remedy saved to suitors by Section 256 of the Judicial Code; U. S. C., Title 28, Section 371.

VII

The provision of the New York Workmen's Compensation Law making it the exclusive source and measure of the employer's liability is an essential part of it; so that the whole statute is invalid and inapplicable as to a maritime injury, since this essential provision is beyond the power and jurisdiction of the State to make or to enforce.

VIII

The New York Workmen's Compensation Law, as applied to a maritime injury, is invalid in that it purports and attempts to work an assignment or transfer of the employee's cause of action against a negligent third person—a provision that is beyond the power of the State to make or to enforce; and in that it purports and attempts to impose upon a negligent third person, under certain circumstances, an added liability of a nature wholly foreign to and incompatible with the maritime law.

[fol. 102] IX

The judgment appealed from should be reversed, with costs, and the cause remanded, with instructions that

Heaney's claim under the New York Workmen's Compensation Law be dismissed.

The above are the points on which the appellants intend to rely.

The parts of the record which the appellants think necessary for the consideration thereof are the entire record made herein and transmitted to this court by the Clerk of the Appellate Division of the Supreme Court of the State of New York, Third Department, under his hand and the seal of the said court.

Elmer Clyde Sherwood, Counsel for the Appellants, Address: 100 East 42nd Street, New York City.

Service acknowledged this 6th day of March, 1936.

Slavin & Leichtman, Counsel for Appellee Edward Heaney, Address: 11 West 42nd Street, New York City. John J. Bennett, Jr., Attorney General, Counsel for State Industrial Board of the State of New York, by Joseph A. McLaughlin, Assistant Attorney General in Charge, Address: 80 Centre Street, New York City.

[fol. 102½] [File endorsement omitted.]

[fol. 103] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 6, 1936

Appeal from the Supreme Court of the State of New York

Treating the appeal papers herein from the Supreme Court of the State of New York as an application for a writ of certiorari,

On consideration whereof, it is ordered by this Court that the said application for writ of certiorari be, and the same is hereby, granted.

Endorsed on cover: File No. 40,371. New York Supreme Court. Term No. 817. P. J. Carlin Construction Co., and The Travelers Insurance Company, petitioners, vs. Edward Heaney and State Industrial Board of the State of New York. Filed March 11, 1936. Term No. 817, O. T., 1935.